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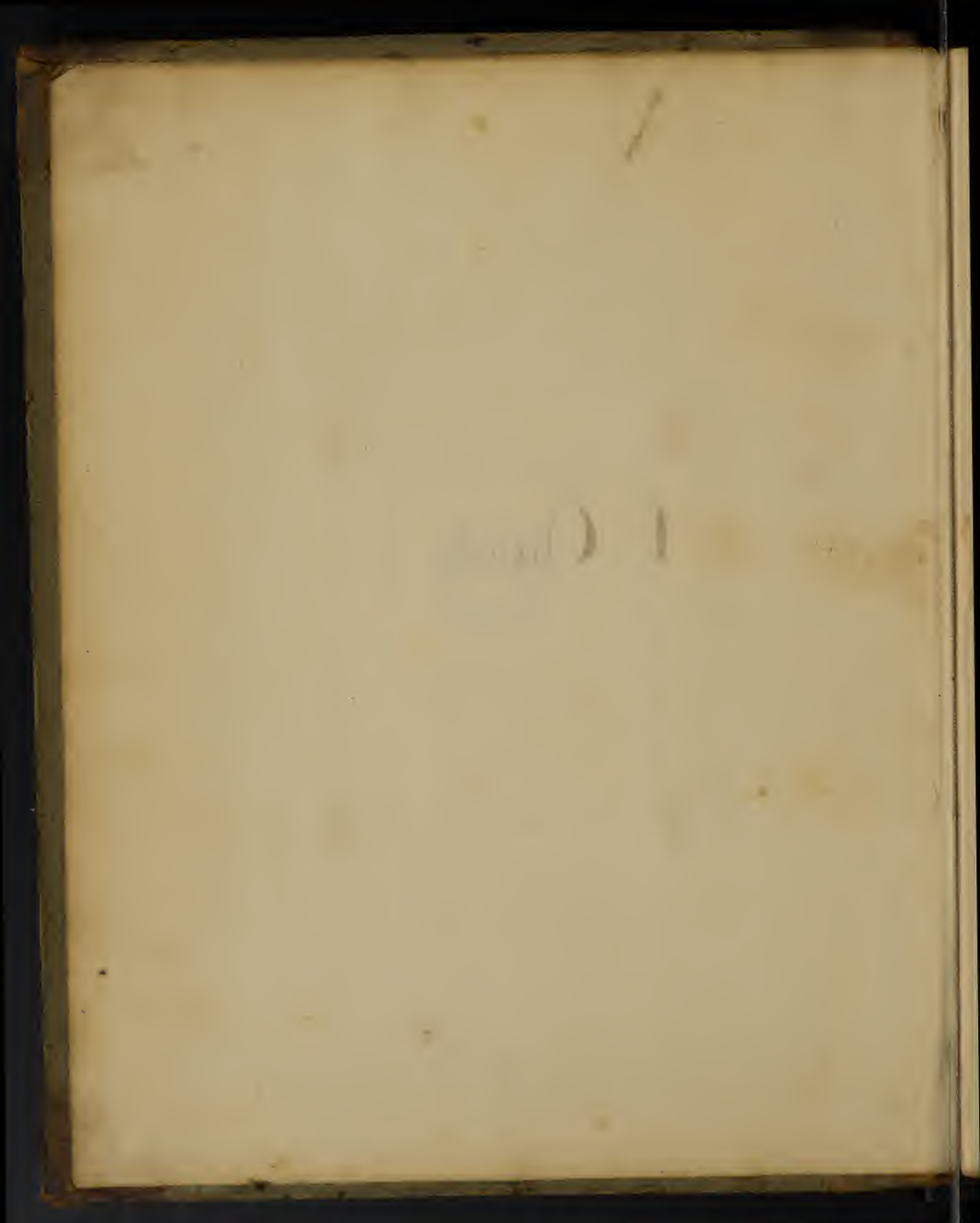
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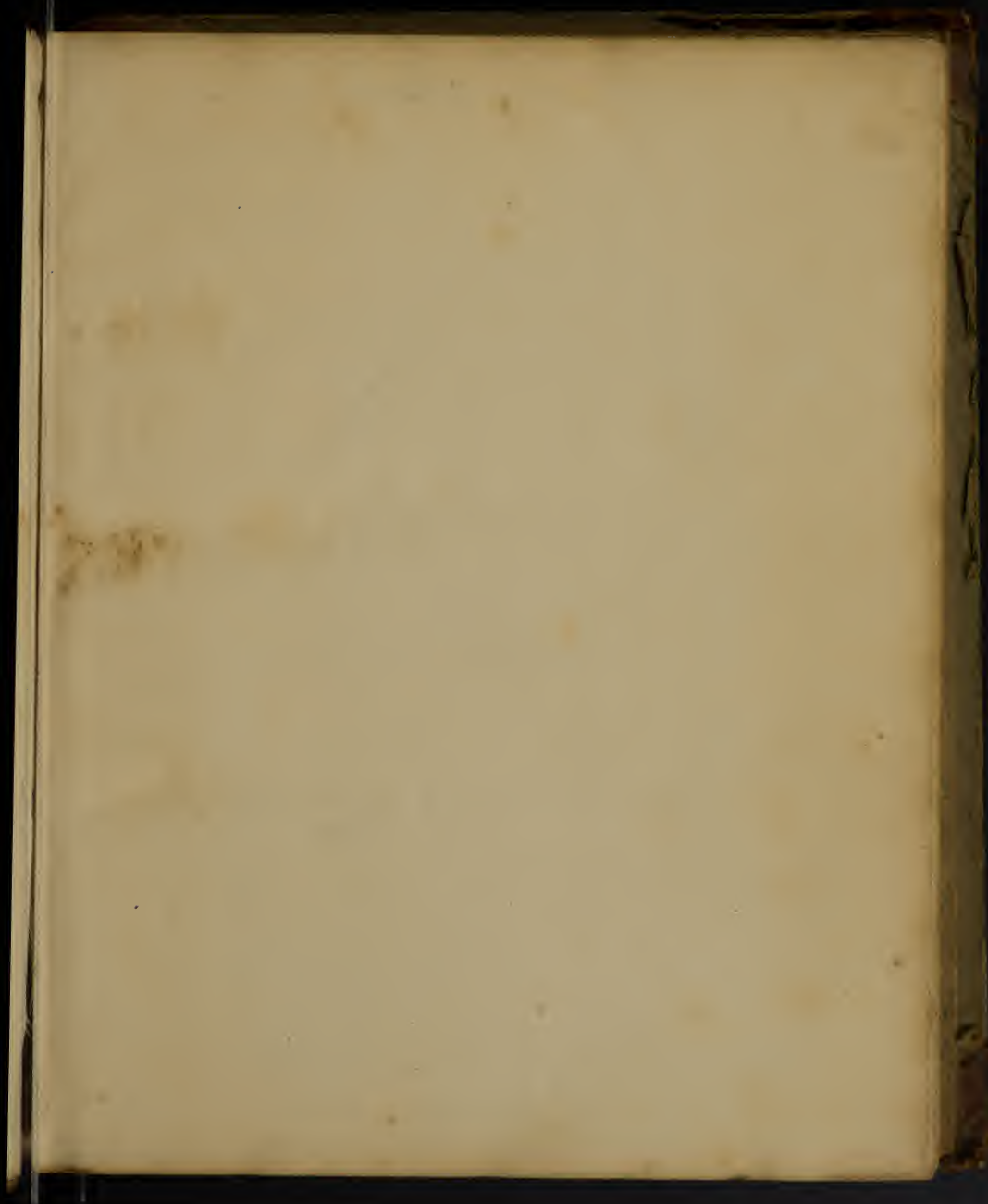
Donald J. Warner

1941

MsB
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v. 3

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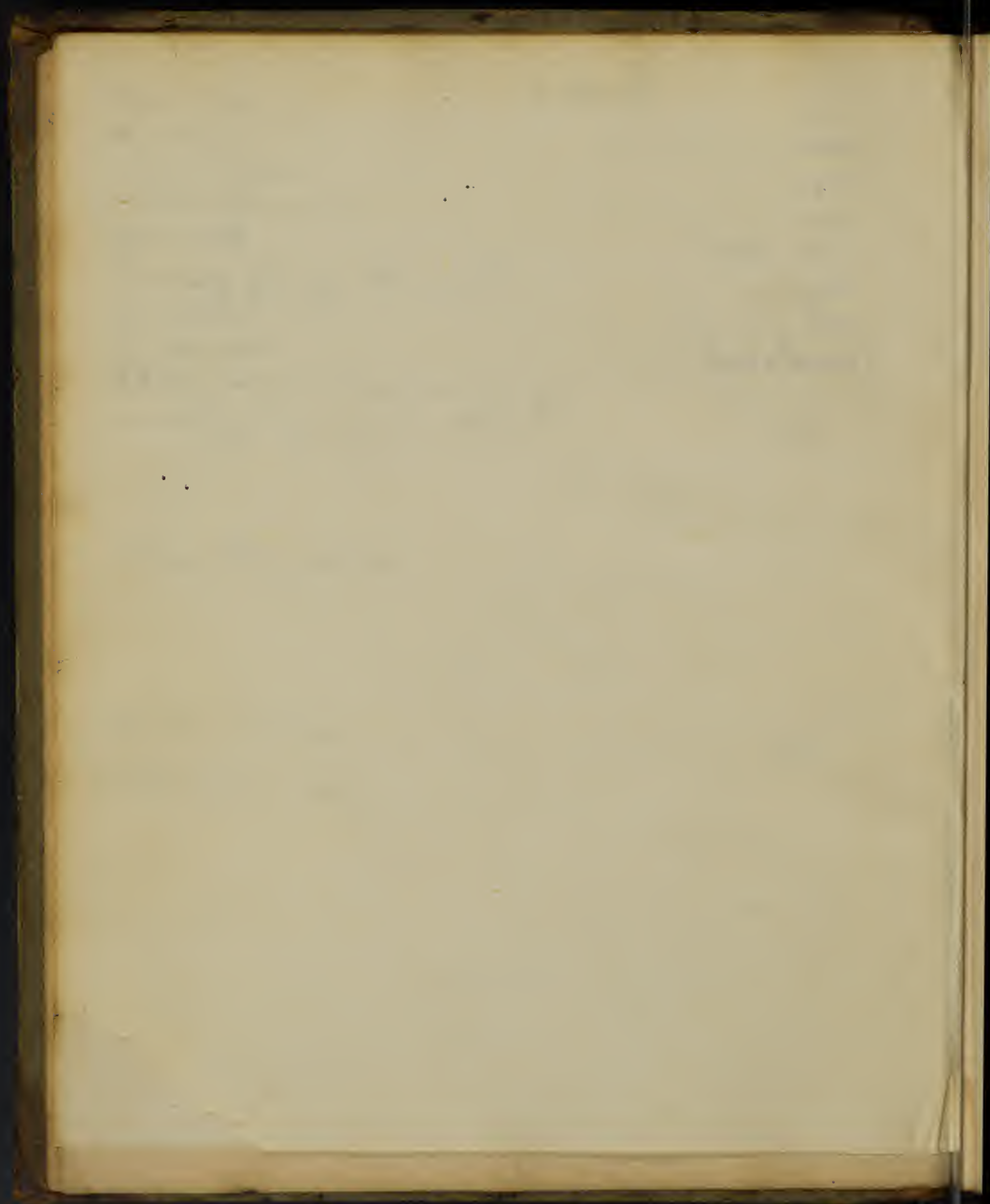
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New Trials

458



Pleas and Readings in detail.

No. 1. 325

Readings are defined to be the mutual allegations between the parties. Pl. & Def. in a suit put into legal form & set down in writing 3 Bl 298. q3. 10 Co 132. 4 Ba 1.

Anciently in Eng^d all pleadings were oral - the counsel delivered in his plea viva voce & then it was reduced to writing concisely by the Clerk or Prothonotary - Hence they are frequently called in Norman French parol - Thus it is spoken of the parol pleading.

In G. Britain from the time of Wm the Conqueror until the 26 Ed. 3 pleadings were in N. French which is properly the language of the Law - from this time till the 1. Geo. 2. they were in Latin & by a Stat. of that year they were reduced into English - in which language they have ever since continued 3 Bl 317. Lamer 29.

The Eng. reports till the time of Car. 2^d were in that language tho the greater part are now translated - All pleadings in civil actions both here & in Eng^d are required to be put into writing - In strictness then pleading is nothing more than sitting forth upon the record such facts as constitute the Pl^r's claim or demand on the one hand & of the Def^t's defence on the other - This is the precise definition of pleading. (1 Ch. P. 215. 3 Bl 159. Doug 278) B. Manfield says that the substantial rules of pleading are founded in the strictest sense & closest logic - & Litt. that it is the most honorable part of the profession 1 Burr 319 Camp 682. 3. Comd P. C.

Letter to the Hon. the Secretary of the Navy

Dear Sir, I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the proposed purchase of the schooner "Albatross" for the service of the Navy.

I am very glad to hear that the proposed purchase of the schooner "Albatross" is being considered by the Navy Department. I am sure that the schooner will be a valuable addition to the fleet, and that the purchase will be a wise investment.

I am sure that the schooner will be a valuable addition to the fleet, and that the purchase will be a wise investment. I am sure that the schooner will be a valuable addition to the fleet, and that the purchase will be a wise investment.

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the genl. object of pleading is to present the claim of Pl. & defence of Dft. in such a manner as will most easily admit of an impartial trial so as to bring the claim & defence on both sides to some precise & definite point - without a system of rules in pleading there would be no uniformity in the administration of Justice. - 1 Burr 319.

Pleading is strictly a syllogistic proof - every good declaration & plea contains the elements of a good syllogism - A declaration is not a syllogism in form tho it is in substance - Ex. Suppose in trespass quare clammum petit the Pl. is the pleader - the major proposition is - Against him who has entered upon my land I have a right by Law to recover damages - minor proposition - The Dft. has forcibly entered upon my land &c. - Conclusion - Therefore against him I have a right to recover damages - The major - contains the legal principle on which Pl. founds his claim - The minor - contains the facts to which the legal principle is to be applied in the particular case - The Conclusion is an inference of Law from the application of the principle to the matter of fact stated - These propositions must all be capable of being denied - The Dft. is at liberty to deny the legal principle - the facts contained in the minor proposition - or the Conclusion - & the rules of Law have settled how they are to be denied - The major proposition is regularly to be denied by em'phue in Law, called a demurrer - the function of which is to admit the matter of fact so far as well stated - but to deny its sufficiency in Law in

Journal of the

First voyage of the ship "HMS Porpoise" under the command of Captain Thomas Truxtun, in the years 1802, 1803, and 1804, to the North Pacific Ocean, and to the coast of North America.

The ship "HMS Porpoise" was commissioned by the Admiralty in the year 1802, and was commanded by Captain Thomas Truxtun. The ship was sent on a voyage to the North Pacific Ocean, and to the coast of North America, in the years 1802, 1803, and 1804. The ship was commanded by Captain Thomas Truxtun, and was accompanied by a crew of 100 men. The ship was sent on a voyage to the North Pacific Ocean, and to the coast of North America, in the years 1802, 1803, and 1804. The ship was commanded by Captain Thomas Truxtun, and was accompanied by a crew of 100 men.

2 to 100 in N.Y. 3 John B. 1115 16 June 1809. 2 John B. 342 3^d 112. 5 June 1803
15 John 326

case of the pleader - The minor proposition is denied by an ipse iudex which may be either a general or special issue - If both propositions are admitted admitted or denied not denied the Conclusion can not otherwise be answered than by alleging new matter & this must be done by a special plea in bar - Def. cannot traverse the Conclusion - he must deny it by special plea in bar - As a Release for instance - The plea of release presupposes the Major & minor propositions to be correct but avoids the Conclusion by something new - This plea must always contain the elements of a good syllogism - Thus - Major - If he upon whose land I have entered release the trespass his right to recover damages is gone - Minor - The Pl. has released the trespass of which he complains - Conclusion - Therefore his right to recover damages against me is gone - Here the Pl. must again be at liberty to deny either of the propositions - If he wants to deny the first he must demur because he denies the legal principle - If the second he will deny that he ever released - If he denies neither he can avoid the Conclusion only by new matter contained in a special replication - As if the release was obtained by fraud he must state the facts - These views of the general principles of Pleading may be pursued from the declaration to the Summons -

* The Writ in Eng. is the first stage of a suit, which is a mandatory letter directed to the Sheriff & issued by proper authority to compel the appearance of the Def. (2 B or 273)

B. But a writ will not be set aside on motion for want of due diligence because the writ issues before the cause of action accrues / 18 Jur. 2. 393 2. 225 / if it appear from the record that the suit is then commenced it is late after verdict 3 Joh. R. 412

* In an action of Ind. Assumpsit for goods sold &c. it appeared that the goods in question had been sold at a certain sum for which payment was to be made in three months after the day on which the bargain was made by a bill of two months - the action was commenced before the expiration of five months - held (Ellenborough C.J. dicta) that the action was prematurely brought. 18 Jur. 2. 393 4 East 147. 2 589

18 Jur. 2. 393
18 Jur. 2. 342
3 C. R. 133

Nice 18 Jur. 2. 393 Barnes 26 since 1833. where it is said that if an atty. bring his action on his bill the Court will stay proceedings till he has delivered a bill to the Def^t - for those 50 which give the atty. the action provide that he shall deliver his bill to the Def^t before he can commence or maintain an action - his action being prematurely brought how can it be stayed? vid 18 Jur. 2. 393. 18 Jur. 2. 393.

Heads and Readings.

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Conf. 155. 7 He. 11 155b. 147. 1 He. 11. 7 & the writ is regularly & for most purposes commenced from issuing the writ - but in B.R. it is not commenced till the reading of the bill - for a bill in this Court is analogous to a bill in Chy - Earth 233

In Br. the declⁿ & writ issue together - In strictness the writ is the foundation of the suit here as well as in Eng^l. but the first stage of a suit is as much the declⁿ as the writ. The suit is not considered as commenced here to all intents & purposes until service made upon the Def^t. for it has been decided by our S^c. C. upon a plea of tender when the writ issues & no service made before tender that it was good tho he tendered no cost - 1 East 406 481 For many purposes however the suit is commenced from the issuing the writ because the cause of action must exist at the date of the writ - As if a writ issues to day on a bond due to morrow & not served till next day the Pl^f. cannot recover / Conf. 454 & 1 East 458 * / Based on special dem^r - 1 Crinis R. 69 - 1 ad on your dem^r & other verdict - 1 Johns R. 342 299 300

The first stage of the pleadings is the declaration or count - this contains a statement of the grounds on which the Pl^f. founds his recovery - The writ is not a part of the pleadings, all the statement it makes is made by the Court - there are no "material allegations or allegations" Lewis, 75 1 Inst 17. Plowd 84: 5 He. 293 - 3 He. 292 Inst. 219.

The words "declaration" & "count" have been used as synonymous terms - but if there are

The History of the County of Kent

The first part of the history of the county of Kent is the history of the city of Canterbury. The city of Canterbury is the capital of the county of Kent, and is one of the most famous cities in England. It is situated on the banks of the River Stour, and is the seat of the Archbishop of Canterbury, who is the head of the Church of England.

The city of Canterbury has a long and glorious history, and has been the seat of power and learning for many centuries. It was founded by the Romans, and was one of the most important cities in the Roman Empire. After the Romans left, the city was ruled by the Saxons, and then by the Normans. It was the seat of the Archbishop of Canterbury, who was the head of the Church of England, and was one of the most powerful men in the country. The city of Canterbury has been the site of many important events in English history, and has played a major role in the development of the country. It is a city of great beauty and interest, and is well worth a visit. The city is situated on the banks of the River Stour, and is surrounded by beautiful scenery. There are many interesting buildings and monuments in the city, and many museums and galleries. The city is a great place to visit, and is well worth a visit.

Recs and Readings

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two or more counts or distinct statements in the cause each statement is called a count & they altogether form the declaration - yet when there is but one count it is synonymous with declaration - The count or declaration is but an amplification or exposition of the original writ - The writ itself must name the cause of the suit & the parties - but it states it briefly it does not state the special causes out of which the suit arises - these are reserved for the declaration 3 B. & 293. 4 B. & 8. 5 B. & 18

We have nothing to do with what is called an action in Ct. This is a clause inserted in the bill in B. & R. for the purpose of giving that Court jurisdiction over matters ^{truly} civil - This Court had original jurisdiction over no other causes but civil except writs for which a fine was due to the King - But when once the Defendant is in custody of the marshals of the Court he may be charged with any personal civil action whatever - of real actions they had no cognizance this way - The writ then may contain a clause charging him with trespass & the action also - the first cause of action gives the Court jurisdiction over the person & then the action enables the Ct. to declare against him in the personal civil action. See 1 B. & 399. 254. 5 B. & 401. 2 B. & 368 B. & 416. 3 B. & 141. 61.

The pleadings include the count in the largest sense of the term - they embrace those allegations only which need the count & denote

General Remarks

The first thing I noticed when I stepped out of the train at the station was the cold. It was a sharp contrast to the warm, humid air of the city I had just left. The station was a large, ornate building with a high ceiling and a vaulted roof. The air inside was stale and the floor was polished to a mirror shine. I looked around and saw many people, some standing and some sitting on benches. They all seemed to be waiting for someone or something. I felt a little lost and alone in this strange place.

I walked out of the station and into the street. The street was wide and paved with cobblestones. There were many shops and buildings on either side of the street. The architecture was different from what I was used to. The buildings were tall and narrow, with many windows. Some of the windows had flower boxes underneath them. The street was busy with people and horse-drawn carriages. I saw a man in a top hat and a woman in a long dress. They were walking towards me. I felt a little nervous, but I kept walking. I saw a sign that said "Hotel" and I went in. The hotel was a large, multi-story building with a grand entrance. The lobby was filled with people and the air was warm. I found a room and went in. The room was small but comfortable. I took a bath and went to bed. I was tired and fell asleep quickly.

The next morning I woke up early. I got up and went to the window. I looked out and saw the city. It was a beautiful sight. The city was built on a hill and the view was panoramic. I saw the river and the bridges. I saw the old buildings and the new ones. I saw the people and the horses. I felt like I was in a new world. I went down to the breakfast room and ate. The food was good and the service was excellent. I went back to my room and packed my bag. I was ready to go.

Pleas and Pleadings

those allegations which the D^{ft} makes by way of defence & those which the P^l makes by way of fortifying his declaration in the limited sense of the term. 15 Sa 168 341 299.

The first stage of the pleading in the limited sense of the term is the D^{ft} plea - The pleas on D^{ft} part are divided into two kinds - Dilatory & Pleas to the action -

Dilatory Pleas /S. 354/

Dilatory pleas are such as tend to destroy the suit by questioning the mode in which the remedy is sought rather than by questioning the cause of action itself. 341 306.

The first class of the D^{ft} pleas admit of a sub-division - According to M. they are of three kinds -

1. Pleas to the Jurisdiction - 2 Pleas to the disability of the P^l & 3. Pleas in abatement - The two last altho often confounded are as distinct as any other plea - These three classes comprehend the whole of dilatory pleas - A different division is made by other writers but the propriety of their divisions is questioned - It is however immaterial as they embrace all kinds of dilatory pleas - 341 310 James 37 - 16 L. 125.

Pleas to the disability are often called pleas in abatement & so are pleas to the jurisdiction - Sometimes "abatement" has been rendered as a general term including all dilatory pleas whatever but improperly - its form is distinct from the

THE FIRST PART

OF THE HISTORY OF THE
LIFE OF THE LATE
JOHN DE Witt

BY
JAMES OGLETHORPE
OF THE CITY OF SAVANNAH

THE SECOND PART

OF THE HISTORY OF THE
LIFE OF THE LATE
JOHN DE Witt

BY
JAMES OGLETHORPE
OF THE CITY OF SAVANNAH

THE THIRD PART
OF THE HISTORY OF THE
LIFE OF THE LATE
JOHN DE Witt

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Plea and Pleadings

other two - the object & effect are different from either of the others, therefore it is improper to call a plea to the Jurisdiction or to the disability of the Pff. a Plea in abatement
4 Bae 35-

A Plea to the action is an answer to the merits of the Pff's complaint & denies the cause of action entirely - A plea to the action may deny the Pff's allegations or right of recovery in three ways - 1. By denying the Pff's allegations - 2. By confessing and avoiding them - 3. By matter of estoppel - This denies the Pff's right to make the averment & is generally considered as an avoidance of the Pff's allegations but it is not strictly so. 3 B & 303,

These pleas are of two kinds - the general one when the allegations are denied - and a special plea in law which alleges new matter in avoidance. 3 B & 303. Lams. 37. 155. 130. 140.

There is another mode of denying the Pff's right of recovery tho he cannot by another plea - which is by demurrer - this is not a plea tho sometimes called one - it does not deny matter of fact - nor does it allege any new matter - it only says "I am not bound to plead" - the form also shows this - answering to the Eng. form the Court after saying the Pff's declaration he is insufficient proceed to say "for want of such suff. matter the Court is not bound to make any answer thereto" - This then I think is a proper view of a demurrer - It lies

Genl Rules

1. The first rule is that the student should be able to read and write the letters of the alphabet. This is the foundation of all learning.

2. The second rule is that the student should be able to understand the meaning of the words he reads. This is the foundation of all knowledge.

3. The third rule is that the student should be able to express his thoughts in writing. This is the foundation of all communication.

4. The fourth rule is that the student should be able to think for himself. This is the foundation of all wisdom.

5. The fifth rule is that the student should be able to work hard. This is the foundation of all success.

6. The sixth rule is that the student should be able to be kind. This is the foundation of all happiness.

7. The seventh rule is that the student should be able to be honest. This is the foundation of all trust.

8. The eighth rule is that the student should be able to be brave. This is the foundation of all courage.

Ch. 216.

Pleas and Pleadings 119

Ten elapsed with pleas to the action but admitting it to be a plea it is not a plea to the action for a defendant may as well be taken to any other part of the pleadings as to the declaration. - A defendant then is a mode of denying the right of recovery but not a mode of denying it by plea. 4 Ba 129 1 Inst. 172 5 Mod 132. 1 Br. 639 1 Inst 71. 5 Mod 232. 2 440 Lc. 326

General rules of Pleading

In all pleas, two things are necessary - 1. That the substance of the plea be sufficient of itself - 2. That it be expressed according to the forms of Law. If either of these are omitted the pleadings are bad - & the first is omitted it is bad in substance - & the second it is bad in form - Both omissions are good ground of demurrer - the first of a general & the second of a special demurrer. Holt 7, 164, 1 Leves 45 1, Ba 2

In all pleadings it is necessary to state facts only & not conclusions from facts - But it is never necessary to state conclusions of Law - Altho particular laws & customs are pleaded when the Court cannot take notice of them yet the genl. rule refers to genl. laws - Customs then are mere exceptions to the genl. rule - The conclusion from a fact is a conclusion from a fact stated in the declaration. 5 Br 70 Lang 159 Leves 46.

Facts themselves & not merely evidence of those facts must be stated - Thus where from the facts

Genl Rules

Such aspect is ruled by predict 12 Lt 164

2964

2890

2. 974. 357

Pleas and Readings

402 333

stated the law cases, a promise it is necessary to state the promise itself as a substantive fact 2. Root 73 L.R. 157.

So in a declaration of trover against an Admin^r a refusal to deliver by Def^t is evidence of a conversion - but it is not enough to state the facts only. Aff must state the conversion as an independent fact - L.R. 157. Cro. L. 913 Sel. 1113 Series 119 2 Ser. 163 2 Root 74 -

However in an action against the drawer of a bill of exchange it is held not necessary to state the promise - Nor in all other cases of indebtedness it is - The reason given is that the drawing of the bill is an actual promise to the holder Regd. 196 Sel. 128 L.R. 538 2 N.R. 63. Hise 224 4 N.R. 157.

All pleas should be direct & not argumentative only way of recital - thus in an action of Assault & Battery it is not sufficient to say that he understands the Def^t assaulted him &c - He must state positively that the Def^t did assault him otherwise there can be no issue - However it has been determined that an allegation following the words *pro se quod* is sufficiently certain Ser 161 Term. 271, 184 Series 89. 134. 76 Howd 128 -

As to mere matter of inducement the word "intention" is generally used - Ser. 117. 59. 134. 75. 6. 1 Inst 303. Term. 117. 73 R. 258 Each party admits as much of his adversary's allegation as he does not deny for leaving a right to deny it follows if he does not that he admits them & they are

Gen^l Rules

Pleas and Pleadings

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taken no confession 4 Ba 2. 73. The pleadings of each party is to be taken most strongly against himself - i.e. if there is any ambiguity it shall be construed against himself. 4 Ba 2. 73. 1811 303 Lamer, 52. 14 Ba 2.

All traversable facts must genlly be pleaded with time & place - the reason of the rule as to place is founded on an ancient rule of E. B. that the Jury to try the fact must come from the neighbourhood & therefore the place must be stated that the officer might know where to find the Jury - this reason has ceased & it is now suff. if the Jury belong to the County - The rule however continues, 3 B. & P. 70. 83. 3 B. & P. 84. 5 Com. 4. 1 Lamer, 57.

The rule as to time is introduced merely for the sake of certainty - when a plea is laid by way of local description the place must be proved as laid - Thus, where time merely as verdict, &c. P. may state a battery in the town of A in the County of B. & prove a battery in the town of C. in the same County - Thus where trespass is laid to have been committed on P. & B. and it is in a particular place - the place must be proved as laid. 4 B. & P. 564 2 East 497. 17226.

The number quantity or price of a thing was not to be stated truly in pleading except when a mistake makes a variance - i.e. whenever a mistake is made in either of these things which issues from the terms of an express contract there is a variance & P. must fail - Suppose A. declares against

Genl Rules

2142

1 Vent. 109

Mod. 150

2 Wks 26

Decided in Ct R 404 that a note must be declared
ed upon according to its legal effect - by note payable
generally must be declared as payable on demand

See yb Burr 325 - The case of Bacon & Page 1 Ct R ⁴⁰¹ decided

This; that the declaration must show a cause of action &
that declaring on a note payable generally in its words merely,
showed no breach of contract.

B. upon a promise to deliver an hundred bushels of wheat & upon trial it appears that 90 only were to be delivered - here is a variance - Lems. in trespass for cutting down timber trees, & proof of fire only being cut. 177. will recover - no variance - in tort there is no variance. Lems. 299 no pleading is vitiated by mere surplusage - Lems. if respondents in a material part - 4 Bar. 2. 49 1 Inst 303 Lems. 62. 3. 5 70 2 East 333 Gent. 288 Cr. S. 377. 549. 618.

It is a general rule that everything must be pleaded according to its legal operation - & always, doubts the propriety of this rule as laid down for facts may be pleaded as they are & the Court will make out the legal operation - It is most technical however to plead as laid down by the rule - Thus if one joint tenant make a feoffment to his co-tenant it may be pleaded as a release. P. Mansf. says in both these cases, the instruments may be pleaded as they are & the Court will give them their legal operation (1 Inst 139. 200 1 R. 1116 Cause 599 1 Saund. 96 Comd. P. & R. 1100 -) & it has lately been decided that it is not necessary to plead as laid down. 2 H. Bl. 11.

That which already appears on the record need not be expressly averred - & that which is certain according to the course of nature need not be averred (1 Inst 303 Co. 54 1 Co. 110. 11. 25. Lems. 42, 2. 1 R. 77.) Necessary circumstances implied from facts that are stated need not be expressly averred - It is common out of abundant recollections - Thus in pleading a

Genl Rules

See comment of J. C. in P. L. 6940

Where the declaration stated merely that the debt was
indebted to the Off. for the use of land & in consideration
thereof promised it was. Holman had no special claim
because it was not avowed that the land was occupied
by the difference or possession of the Off. or at the debt. special
instance & request Bradley & Davenport 6621.

Issues and Readings

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judgment it is not necessary to allege every of them for these cannot be a judgment without it - it is must however. But 203. Lanes 48. Planch 65. 9 Co 54.

x What the parties have once admitted in their pleadings cannot afterwards be contradicted - They may move to amend their pleas but while they stand they shall not be permitted to make others which contradict them - This rule is so strong that such facts cannot be contradicted even by accident - They have no concern with facts not put in issue - 11 Boar. Lanes 118.

Genl. estates in fee simple may be alleged generally - i.e. - he who pleads a fee simple may allege that at such a time he was seized in fee simple - not necessary to state how he was seized - But when one pleads specifically a particular estate he must shew specially the commencement of it - The reason of this diversity is that genl. estates may be acquired by wrong only descent - Particular estates cannot - they are to be specially contrasted - In the former case whether descent or not is to be tried by a jury - In the latter the jury have nothing to do with the contract which created the estate D. B. 333. Lanes 117. W.B. 77

Immaterial averments must sometimes be proved on the party pleading them must fail - they must be proved when they relate directly to the point in question - This is the language of the books - but I state the true reason of the rule to be this - where a verum follows for not proving them - or they must

Genl Rules

Where a contract is in its terms defective it sh^d be declared
on account of its legal effect. The time for performance
sh^d be added to be on request as of March 137 4 P. 314

Pl. Pe 842

be proved when they enter into the same description of the thing or subject alleged - Ex. l. b. resp. against B. alleges that B. was the son of J. B. - this is an immaterial averment & need not be proved - but when an action was brought against a Sheriff & P. alleges that Sheriff had taken goods to which he was entitled for rent & that the rent was quarterly - he was obliged to prove the latter allegation Daug 610. 8 East 9 Daug 665. q. 164 232

Important averments need never be proved - there can be no variance 1st 1104 Daug 646 338 440 2 East 197. 1140 5 East 213 Bull. 5 - 2d 1501. 13

The note to the case in Daug 640. says the rule is confined to record & written contracts - but I think it is not supported by any thing - it is however confined to records & express contracts but the contracts may be written or parol - If the declaration or any part of the pleadings want form merely on mistakes in time or place it is generally cured by the other pleading over - or demurring specially - Duplicitly is only formal if therefore the other party plead over the declaration &c. is cured - Scias if the declaration &c. is materially defective - not cured in any way - 7 Co 25. 8th 120 1st 303. 2d 519 2 Kent. 222. Scias 193.

Neither party is bound to allege more than will prima facie amount to a sufficient cause of action on the one hand or a sufficient defense on the other. - & a party is not bound to negative all the possible answers that may be made to the allegations. 2 Will. 100 2d 103

Gen! Rules

L.R. 400. 1841. 1849. If the plea in bar expressly avers a material fact omitted in the declaration the declaration is aided by amendment it - So if the plea in bar omits a fact & the replication states it - Ex A. but the facts against B. for taking a certain iron hook but did not aver, prop^r he - the Court in his plea said he took it & yet he had some reason said - thus admitting he took from prop^r he - 5 B & 199 1841. 1849. Com D.P. 655 & 87. 87.

New matters alleged in any stage of the pleadings after the declaration must conclude with a verification because a verification is an established mode of keeping the pleadings open so that the other party may answer - If then to an action of debt on bond & c. plead, payment & conclude, "I of this be true, believe upon the oaths" the P^r must be compelled to join in the issue for he can have no opportunity to make a special answer (3 B & 309 1 Saund 103 n. 114 117. Camp 575) The St. George's case introduced a single exception to this rule in the case of bankruptcy - but this is an anomaly 1 Cam. 115 - And in every stage of the pleadings each party may meet the allegations of his adversary either by denying - confessing & avoiding or demurring to them - this may be done even where issue is tendered. 3 B & 309 1 Saund. 103 1 Cam. 118 Camp 575 -

The proper office of the replication is to fortify the declaration by attacking & answering the plea in bar - the office of a rejoinder is to fortify a plea in bar. 4 B & 6 1841. 304 2 B & 310 Plowd. 7.

Genl Rules.

When the act of the Off. & the promise of the dept. take place at the same time the law does not require as in case of a by gone transaction that in order to make the promise binding the Off. should have acted at Dept. request 32 C L 297-

Public Officer tho not expressly authorized to sue
a. St. have a capacity to sue commensurate
with their election 4 Hill 137 18 Johns 407 1 Cow. 240. 244
3 Ward 193 7 do 181. 19 do 50

L138
7 Co. 15

Pleas and Readings

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The judgment of the Court is always rendered upon the whole record - Now suppose the declarⁿ to be radically bad the plea in bar good & demanded to - The Def^t must have judgment for the judgment, always attaches upon the first substantial defect - So if the declarⁿ is good the plea in bar & replication radically bad & the replication demanded to P^{ff}. must have judgment. Hob 199 & Co 120. 133 9^d. 110 11 Ann 56. 288 -

The declarⁿ being the foundation of the suit must show all that is essential to P^{ff}'s right of recovery - a party is to recover as he alleges, & proves - but he is not allowed to prove any thing which he has not alleged - if therefore he has not alleged material fact he must fail. Hob 199. If the declarⁿ does not show that at the date of the writ P^{ff}. was cause of action & affortiori if it does not show so fact which infers he had one he cannot recover - or if in suit on a bond it appear that the suit was commenced before the day of payment P^{ff}. cannot recover - or warrant cannot aid with a declaration - warrant would be erroneous. 7 Co 24 2 Sess 397. Plaid. 84 Carps 154. 7 Hb. 4 - But where a party bound by a contract disables himself to perform it before the time appointed for performance the other party may have an action immediately - Ex. A covenants to convey land to B in ten days, & in fine conveys it to C. - A is immediately liable to B in cove^t. broken notwithstanding there is a possibility that A may be able to perform his cove^t. in ten days - this possibility the law does not regard 5 Co 212.

Genl Rules

If the clerks declare on the replication or set up a new
formic absolute in its terms proof of a cond^l one is inadmissible. 10th 216

6 Mand^l 294

Coup 682.3.
May - 315.

L200.

L764

Deas and Readings 340

From the genl. rule that the declar. shew de. it follows that the omission of anything which is the gist of the action is an incurable defect - The gist of the action is that without which ^{there is} no cause of action appears 4 Bac 8 5 Mod 205 - If Def^t. claims to such an omission as this or if he pleads to issue & the verdict is against him he may arrest the judgt. for the verdict does not cure the defect. Doug 658 53 R 472 2 W Bl 201

In pursuance of the genl. rule it follows that the declaration must contain certainty - i.e. the averment must be certain that the Def^t. may know how & where to answer & that the Court may know how to give judgt. - but principally that the Def^t. may plead the judgt. in bar to a second action for the same cause or thing 5 Co 34 Buss 2456 5 Bac 272 Doug 315 -

The declar. must contain certainty as to time place & subject matter - The principal questions on this subject have arisen with reference to the boat - If one bring trespass or trover for chattels declar. must point out what chattels - So in an action on contract aff. must state the particulars of the contract - but it seems now to be settled that no greater certainty is required than the nature of the thing and deal with conveniently - thus in an action of trover for a ship & goods does boiler's declaration enough - much greater certainty formerly required - 1 Bac 24 5 Co 115 272 2 Saunders 74 5 Co 34 Cr. 887. Vent 53 Pol 878

Genl Rules.

When Suit is not agt 2 or more & one is retained not joint
& does not appear and is misnamed in the process Off will
be nonsuited 4 TR 611 2 Exp 702 Luter 35. But if he appears
advantages can only be taken by plea in abatement
16 Bond 612. vid also 1 Ch 441 Eccl 184. 1 Bos 450 3 Smith 95
2 Bond & Bing 34 2 M & B 1120 16 East 110 7 Binn & Chap 487
3 Tarrant 488 2 Phil 129. 183 5 Bos 453 1 Bing 143.

Where a part of the joint creditors only are sued
advantages can only be taken by plea in abatement
1 Summ 291 l. c. 2 M & B 950³⁴ the this appears from the
declaration 16 Bond 615. que. 1 Pat 317 1 Saund 291 b-

Ch. 117.

2 Ch. 231. n.

1 Saund. 291 b.

Pleadings and Readings

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As to matter of inducement & aggravation the rule is still left
 stand for upon such matters no issue can be formed - It is not
 of the issue. See 71. 158 or 188

Matter of inducement is matter
 introductory of the principal subject & is inserted to explain or
 introduce the subject - Matter of aggravation is that which
 shows the circumstances of enormity attending the principal
 part of which complaint is made 88 R 178 2 East 66. R 888
 The words "said" & "aforesaid" do not import suff^y certainty when there
 are two antecedent subjects to which reference is made 88 R 178

A declaration

may be in part & good for the residue - It is good for converting
 a quantity of cloth & also for a horse describing him with suff^y
 certainty - declare as to the cloth but for the horse P^{ff} would
 recover 6000 R 72. 32 2 Saunders 379 R 286 Sal 286

When one pleads

a contract &c to the validity of which a deed or written conveyance
 is necessary at C. L. he must plead the instrument & state it -
 Now if he pleads a release he must state it to have been by
 deed for there can be no release except by deed - the rule is
 the same with respect to contracts at C. L. But a contract
 authorized by St. & required to be in writing must be so
 averred - 4. Consequence - this depends upon 4. 32. R 8 & that
 St. requires it to be in writing - all this is a necessary consequence
 of the general rule that a man must show in his pleadings
 all that is necessary to his claim or defence 3 Bull 279 2 Wils.
 376 6 Leon 24 12 Mod 340 But in declaring on a contract
 which is good at C. L. without writing it is not necessary to

Genl Rules

In an action agt. the directors of a corporation, a preliminary rate
inletted up must be established against both as res remedy the,
the directors may be ordered without a preliminary to pay the debt
15 How 317 1 Green C.E 122 1 Ch 32

Where an act of incorporation subjected the corporation
individually to the payment of its debts it was
held that one stockholder could not sustain an
action against any of the others on a debt due
him from the corpⁿ his remedy being in Chancery
so one stockholder indorsee of the note of the
corpⁿ cannot sustain a suit against the indorser
to avoid circuity of action for being a debtor in
his individual capacity the indorser might recover
the same amount both 3 Hill 189 and 13 Pick 484
23 do 112

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Meas and Readings to whom

and that it was in writing altho by H. it is required to be in writing. Ex. St. Francis &c. in those cases the writing is not an instrument containing the right but more evidence of an agreement by parol - at L. they might have been taken as if they were not written & as this has introduced a new rule of evidence merely & not a new rule of pleading, the Collier remains as at C.B. Bull 279 Bun 1890 Camp 289 Rob. on St. 202-

If however an agreement be under the St. Fr. is good at C.B. without writing & required by H. to be in writing is pleaded by both in bar to the declare. it must be pleaded as being written for much greater strictness is required in this case - the C. often in this case admits a cause of action he must show a contract which is good to all intents & purposes Bull 279. B. P. 45 - 1 Sam 276. 2 C.B. 231 n. P. 227

A declare may be either genl. or special - the difference between them is that the cause of action is stated generally in the one & specially in the other - Ex. Declare on the bond of a house is genl. but if it state also the covenants & breach it is special - so in declare in assumpsit if P. state genl. that D. promised &c. but if he state particularly what grounds & describe them it is special - A P. declaring on a deed is not bound to set out more of it than will entitle him to recover - An instrument may contain many stipulations each of which affords a cause of action yet P. need not declare on them all - In declare on bond P. need not note the condition - so in a case if there is a defeasance P. need not notice it if it is matter of defense.

Joinder of Parties

§ 40-41

In actions for tort the joinder of

Ch. b.

1 East 497. 501

If A & B pay a debt for C. they cannot join in an action agt. C. unless they paid it out of a joint fund

2 R. 380

Yelt. 177

§ 167.

5 East 225. 3 B. 235 19 Solm. 216

Ch. 10

1308. 383.

If two persons have an entire damages they may bring a joint action tho their interests be several

3 M. 249

1 Lev. 109

2 Dec. 27 1 Vent 167 2 Wils. 423 1 Saund 153 291 6 n. 4.

But if all are not joined a pt. can take advantage only by plea in abatement. & cases that the one not joined is alive

1 Saund 291 n. 4

for debt but where there is an exception in the body of the instrument it is bound to take notice of & negate it Case 412
In declaring on a promise the word "promise" is generally inserted yet it is not indispensable - the word "agreement" has lately determined to be equivalent 2 N.R. 12. 1st 1813 3d 1813 160

Joinder of Parties

Joint rule that when two or more are interested in a right they may & should join in the action for the violation of it whether the action sounds in tort or contract - This rule becomes an universal criterion as far as it goes - it is founded in this obvious principle "the remedy for the violation of a right belongs to him who has the right". 1 Ch. 1st 1813 9
8 N.R. 332. 1st 1813. 7th 1813 116. 2d 1813 17. Bull. 30. 3d 1813 186. 3d 1813 382

Joint tenants must always join & in some cases tenants in common so if a promissory note is made to two both must join 3d 1813 351. 1st 1813 332.
2d 1813 1st 1813 291 5th 1813 19. 1st 1813 153. 2d 1813 80. 3d 1813 117

When the right is in one only a stranger cannot join for a violation of it & if he is joined he may take advantage of it under the joint issue 1st 1813 113. 1st 1813 115. 1st 1813 24. 1st 1813 35. 2d 1813 133
1st 1813 23. 3d 1813 139. 3d 1813 149. 6th 1813 374. 7th 1813 118. 8th 1813 49.

Jointly by Ex^{rs} all the Ex^{rs} must join tho one of them is within age or has refused the trust for they are all considered as entitled to action till summons & severance. 1st 1813 95. 1st 1813 291
1st 1813 130. 9th 1813 37. 1st 1813 16. 1st 1813 13. 3d 1813 558. 2d 1813 209. 12. 1st 1813 18. 1st 1813 13

Joinder of Parties

If two or more may join in an action for slander where
their joint interest is injured - Ex. Slaves of the title of joint tenants
So much of each of partners in the way of their trade whereby
they have sustained a special damage - 3 Rob. 1004 is
Buckell's ¹⁴⁹² Second 1762 1 Ch. 51 Alleging special damage

In case of the nonjoinder of one of several parties to a joint
contract & first - had agt. him off loses his remedy agt. the
other 1 Cr. 30 600 373 46000. Action R. 11.

S. 169

996
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A sign a note for the benefit of B. upon the assurance
that C. should also sign it also afterwards died so. A.
was compelled to pay the note. Had he then C.
& D. were co-sureties & that it could not sustain a joint
action agt. them but sh^d sue them separately for their
proportionate share of the money paid & should 432
2 Nov 268

S. 202

Meas and Readings

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But if the several rights of two or more are injured by one & the same act they cannot join in the action. Ex. l. slander B & C at one & the same time - each may have an action but cannot join - 1 Bos 10. 1 Cr. 513. 1 Ex. 504. 1 Cr. 513. 2 Cr. 117. 3. 2 Cr. 215. 1 Cr. 51. 1 Cr. 226. 1 Cr. 291. 2 Cr. 116. 1 Cr. 117. 1 Cr. 513.

If there are two or more joint co-defendants & one dies his ex. cannot join in an action with the survivor for on the death of one of two parties jointly named the whole remedy survives to the survivor. 1 Bos. 115. 1 Cr. 497. 1 Cr. 105. 1 Cr. 1196. 1 Cr. 1137.

Where the cause of action arises out of the joint act of two or more they may be joined as co-def. & in case of contracts must be - but two cannot slander jointly. Bull 5. 1 Cr. 28. 50. 1 Cr. 133. 2 Cr. 114. In trespass malicious prosecution &c. many numbers may be co-def. & all or less may be sued 2 Cr. 504. Bull 5. 1 Cr. 6. 1 Cr. 262. 1 Cr. 199. 1 Cr. 114. 2 Cr. 117. 1 Cr. 114. 1 Cr. 985. 1 Cr. 114. 1 Cr. 114.

The rule is different as to slander which is a wrong merely - Malicious prosecution is a tort - the speaking of slanderous words tho' it is wrongful & subject the party to an action yet it is not strictly a tort see Bull 5 - But if two unite in committing a trespass they may be joined. So if two unite in publishing a libel for there are acts in which they may join - In those cases in which a party may sue all or either see 1 Bos 10. 1 Cr. 6. Bull 5. 1 Cr. 114. - as to libels see 1 Cr. 985. 2 Cr. 114.

But if two or more are sued for

Joinder of Parties

If husband & wife join in an action it must be shown how the wife has an interest. 2 Cases R. 221

2 In case of non joinder advantage can be taken only by plea in abatement in which Def. must aver that the other joint obligor is alive 1 Saund 291 An 2. 5 Burr 2614 5 Co 119 h. R. 769.

Declarⁿ that Def. & another made their promissory note by which they jointly or severally promised ^{to pay} he is good S 168
263
[Caus 332] & in this case if the note had been a joint note only & Def. could have taken advantage of it only in abatement. not both. 1 Caus 332.

If an agent make a contract in his own name the principal may sue & be sued upon it so where persons were jointly indebted in the purchase of goods bought by one alone all may join in an action agt. vendor for arrears of the contract tho. he was ignorant of the other interest in it 21. Co 146
Execution is liable in Eq. 1 Cl 37 2 Nott 277 3 Nott 399
2 Nott 106-

Where two of several joint contractors sue dead advantage can be taken only by plea in abatement. 11 Pet 97 for it is held the contract of the def. tho. not solely theirs & so no business

News and Readings

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distinct tort committed by each there must be concert of acting *Hiles 153 4 Ba 10. & ut supra*

B. On the same principle it is if two or more bind themselves in a joint contract they must be joined in the action on that contract - the cause of action arising from the joint act of the parties. but if two or more bind themselves in a joint & several contract they may be sued severally - each or either. *3 Ba 897. 101 293 2 Vern 99 164 30 1 Saund 153 n. Bun 1290. Ro 161.*

If three bind themselves jointly & severally all may be sued together or one alone - but two without the other cannot be sued. off must treat the contract as joint or several he cannot treat the contract both joint & several at the same time. (*Yel 26 101 235 1 Saund 291 m 3 Br 782 3 Ba 1498. 164 30. 2 Vin 68*) and whenever two or more bind themselves by one contract that contract is joint of course unless the terms of it imply a several obligation. *2 Alb 36. Ch B 175*

If two execute a bond & one dies his ex is not liable always to the obligee & cannot be joined in an action on the bond with the surviving obligor - for when the whole obligation is joint the whole remedy survives against the survivor - & even if joint & several he may sue the ex alone or survivor but cannot join them (*1 Lev 200. 400 164 37. Carth 105 Briss 1196.*) - quite different (*Carth 171. 2 Vern 1190 2 Lev 228. 2 Vin. 67. 70*)

When an action is brought against Ex those only who become administrators can be joined

Joinder of causes of action.

in 2 S.R. ⁶³⁹ where Pff was compelled to concede two causes
but for the same cause & at same time - L. 350

A count on a recovery in a sale of a count in a purchase, John R. 503
the receipt being the gist in both counts may be joined in one plea
because to which Df may plead not guilty - 2 Cases R. 216. 12. 8 - 3

Where the injury arises out of a breach of contract the 2 Cases - 360
entire the loss in tort shall be deemed to arise ex contractu
2 N.R. 365 454 affirms on over 12 East 88 1152 overruling
3 East 62. 2 Cases R. 217 w -

L. 202. 3

2 Wils. 319
3 S.R. 433
4th 347
5 1212

Misc and Readings 155 to 1700000 346

because the ^{off} cannot know who are ex^{ts} unless they administer & hence the ex^{ts} might refuse the trial & ^{off} would be defeated -
Dunbar 291. 1 Ser 161 Com. Pl. 110 3 N. 557. 1 Ch 38. Soller 307.

Joinder of causes of action

The genl. rule is that several causes of action being of the same nature & between the same parties may be joined in the same declaration by a holder two promissory notes against B he may join them in one declarⁿ but in different counts Com. 244. Com. Pl. 110 9. 1 B & 11. 1 Ch 117. 1 Wils 252. 13 B 276.

(1) If the same nature are many causes of action which require the same judgment & if there are in ind cases but two judgments - a "misericordia" & "casus" - in the former the ^{off} is answered - in the latter ^{off} - in the first there is no force - in the latter there is "in et cum" - Causes of action requiring these diff^t judgments cannot be joined - But in genl. if both causes require a "misericordia" or both a "casus" they may be joined. 1 B & 30 - 2 Wils 319. 252. 1 Went 266 Lang 652 5 B & 191
If then A holds a bond against B. & B also owes him on simple contract both may be joined in the declarⁿ for both require a misericordia - But this rule is not universally true - in some cases there can be no joinder because the causes require diff^t pleas - But if the causes require the same plea & the same judgment & are to & against the same parties they may always be joined provided they arise in one & the same right 13 B 276 1 Wils 252. 1 B & 191

2 B & 191

Joinder of causes of action

A 10 Idm R 240 which was a joinder of a count for trespass damage fearant
with one for a found breach or serious-fear -

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Pleas and Readings

2 To several trespasses with force may be joined - & trespass for taking away goods & for entering in land - but in diff^t counts. Caus^s 230
 So trespass on the case & Stander - Stander & Malicious
 prosecution - Caus^s 552 8 Co^y. 8 1 Vent. 223 2 Bl¹ 848 2 East 40
 16th 196 2 Saunders 117 8 Co^y. 8 2 Ven. 38 1 Bl¹ 277. Bull 54.

There is a
 doubt in the books whether Ejectment can be joined with
 Battery - I see no reason why they cannot they stand in
 force & the gen^l issue is the same - this doubt is not found
 in any modern books. Ad 249. 4 B^e 12 - Debt & Detinue
 may be joined according to the gen^l rule - tho the gen^l issue
 is diff^t the judgment is the same. Cro 620, 316 1 B^e 147.

But causes
 of action of the same nature arising to the same person
 in diff^t rights cannot be joined - This rule falls within the
 proviso of the universal rule. & Count for money had &
 received in one own right cannot be joined with a count for
 money had & received in his right as, etc. - this case is
 an also an to that of diff^t persons suing in diff^t rights &
 joining in one declaration. 1 Wil. 171. Sed 10 2 Stra 1271 Gent^l 235
 1 Bl¹ 489. B^e 559 4th 280 3 B^e 307. 16th 203 2 Saunders 117. See
 6 East 405 - This rule relates not strictly to a misjoinder
 of actions but to a misjoinder of counts - for the causes of action are
 of a nature to be joined - On the other hand causes of action
 of diff^t nature - i.e. requiring diff^t judgments at C. & can never
 be joined - as trespass & contract nor trespass & trespass on the
 case arising ex delicto - for tho here the plea is the same yet
 the judgments are diff^t - so trespass on the case cannot be joined

Joinder of causes of action

* Note Court may be joined where the money or other recovery would be equal - 16 Geo. 2. c. 29. s. 406. 13 Geo. 2. c. 28. contra 7 H. 358

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with contract the the judge is the same yet the plea is diff^t 10
1 Ba 30 Serb 211 2 Wils 319 1 Vent 300 Barr 1114 Ld 1658 Cuthb
189. 1 Cl. 199. 1 SR 276. 2 Rev. 101. 3^d 99. 1 Sed 10. 3 Wils. 354. 6 East 335
Wills. 118.) & in no case can tort be joined with contract tho
it be a tort ^{not} ~~not~~ ⁱⁿ ~~in~~ ^{force} - the gen^l issue is diff^t not
withstanding. 1 Sed 10. 1 Ba 40

But account cannot be joined
in one action for the they are founded in contract yet the
pleadings proceedings & judge are diff^t - account commences
be joined with any other action. 4 Ba 11. P 21. 1 Mod 117

The result
of these rules appears to be this - where the judge & gen^l issue
are the same - the parties suing & being sued in one & the
same right there may always be a joinder - but the
exact limits of the rule that where the judge at C. L. are the
same are not prescribed - learnt only by examples - On the
other hand - where the judge at C. L. are diff^t there
can never be a joinder & a fortiori where the judge
& gen^l issue are diff^t - But where there are causes of
action which in their own nature may be joined
there may be a misjoinder of counts - Ex Adm^r is liable
on a promissory note made by himself & also on a
promise by the intestate - they cannot be joined in
one declarⁿ against him - if they are it is a misjoinder
of counts - Adm^r is liable in diff^t capacities - first in one
case is de bonis testatoris & in the other de bonis propriis
11 SR 437 8th 478 - 1 Cl. 205 2 Saund 117 Hol 88 2 Rev. 228. 24 in 45
4 SR 307 - 1 Cl. 108

Joinder of causes of action

A count on a *St.* for double damages may be joined with
a count at *Co. l.* for like damages - the form of the count
appearing the same *11. P. 246 4. M. 146 2 Ch. 187*

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Mans and Readings

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The joining of several causes of action which cannot be joined is a ground not only of demurrer but also of error of judgment - defect is radical & nothing can cure it - for there can be in one civil action but one final judgment - on a misjoinder the Court cannot give the requisite judgment. 1 Sed 10. Earth 436. 3 Lev 99. 1 H Bl 108. So declarⁿ is led on error - (1 Cl 206. 2 Wm 124. 4 Bl 347. 1 H Bl 108.) Off. cannot enter not. from to prevent the operation of the demurrer - 1 H Bl 110. 11. 12. 124 4 Bl 360. Sidel. P^r. 3^d 630. 1 Saund. 207c. see 1 Cl 206

A misjoinder is very diff^r from what is called duplicity in the declaration - the two are often confounded - the former consists in joining several distinct causes of action which cannot be joined to enforce several distinct substantive rights of recovery - Ex. Count of debt on bond. & count of trespass for damages in one declarⁿ - it is a misjoinder - But Duplicity consists in joining several grounds of action to enforce one right of recovery - Ex. If insert an indebtedness & then insert a promise. this is duplicity - the ground is not misstated - it is a distinct ground of action - But a declarⁿ in trespass charging the Def^t. with breaking off house & destroying his goods & beating his servants for good service comit - the the beating the servants comes in vane - the beating he is but matter of aggravation - the breaking the house is the gist of the action - therefore there is neither misjoinder or duplicity - If these two grounds should be put in diff^r. counts there would be a misjoinder. Earth 113 Sed 642 Exp 407 Ma. 48. 202 3 Wils. 20. 3 Bl 292

Miscellaneous rules

§ 353

§ 1020

§ 203

Rules and Readings 350

When several distinct actions are laid for several things of the same nature between the same parties the court on motions will compel a joinder of them - to prevent vexations. But this proceeding is discretionary & where the Court suppose diff. defences will be made to the diff. claims they will not compel a consolidation. See 1149. 8 Comb. 214. 2 S.R. 639. 4 B.R. 112 & where this is done the Pff. is usually compelled to pay the cost of the application. 2 S.R. 639. 1 Ch. 196. Term P. 2. 556.

When a declin^r is demanded to for a misjoinder of counts it seems to be the latter opinion that Pff. may enter a not. pro. (ante) as to one & thus cure the misjoinder - 1 Ch. 206. 1 H. Bl. 110. 11. 1 S.R. 360. Term P. 8th 630. (same 207.) - tho the Court will in genl. give the Pff. leave to amend by striking out some of the counts & paying costs (1 S.R. 848) formerly Holden that Pff. could not enter a not. pro. after demurrer - 1305. 15. 277 -

The difference between a Copiator & a misericordia never existed in Ct. for here there is neither one or the other - still the rules of misjoinders of actions are the same as in Eng^d -

Miscellaneous Rules

The declin^r must always agree with the writ - for the writ is always the foundation of the pleadings - It is that which authorises the Court to take cognizance of any cause 1606. 180. Brob 325 -

When Pff. right of action is to commence on some

Miscellaneous rules

In possessory actions not necessary to allege in the declaration...
the former estate is seized of or to lay any title either
by grant or prescription to the thing which is disturbed
I hindered from enjoying Owen 109 Bro. 118 Dill 508 Bro. 6
575 L. tit. 119 2 Vent 183 1 Del. 360 2 R. 804 Com. R. 44 Darg
223 2 Saund 114 a. n.

A party need not state a fact which is more properly to be
stated by the other side. 1 Ch. 228. Com. R. 881. 2 Saund 62
83 R. 167. 5th 615. 2 Wils. 117. Ex ceptions - Pleas, not favored
by Courts. Ex. alioerung - 83 R. 167. certainly to a certain
intent in every particular is required in pleas of this kind
Lewes 54. 5. Coups 682. 2 R. 131 530. 166 138 Darg 159. Com. D.
Ex. of. 4. Co. L. 352.

condition precedent he must ever performance in the deed -
equivalent test in the deed - for in some cases he may recover
tho he has not performed - as if Exor promised it - if in this case
he should ever performance he would be bound to prove it - then
condition of this covenant is an immovable object because without
it there is no right of recovery - 13 R 645. 7 Co 10. 7 3 R 125. 1 Scauld
319. 2 R 315. 1 East 203. 8 R 319.

But where Pl's right of action is
qualified by a condition subsequent he is not bound to take
notice of it - it is matter of defense for the Def - here the
condition is to be performed by Def in the former by Pl 7 Co 10
18 R 338. 1 R 3125. 7 R 574. Is there an independent
covenant? Pl's need not ever performance of his part - seems
where they are dependent. Ex. If you promise to pay me \$100 in
consideration of my having promised to accout for you
- here I may sue without assenting performance - seems if it
had been in consideration I would perform - (Hargr. Co 389
2 R 240. Hol 88. 10 R 228. 2 Scauld. 2 R 316. 2 R 117. 3 R 610
7 R 455. 5 R 114. 24. 673. 989. 13 R 645. 14 R. 659. 1 East 216.) & it
was formerly holden that this kind of pleading was not aided
by verdict - but this rule appears to be relaxed & in Stap, it has
been holden to be all on a special demurrer only. 1 East 303
2 Leon 206. 8 R 316.

But even in cases where there is within the
rule "that the offense be should be laid positively (Cant. 333) &
not by way of recital or otherwise" it is well settled that the
word relict or widet where not so pregnant is sufficiently
positive - as in a declaration for a certain sum of money

Miscellaneous rules.

Matter which would have been a defense to a former suit cannot be made the subject of an action 12 Johns R 347 / So where the sum claimed was by mistake omitted in the form returned by the Court no action lies to recover it 11 Johns R 530.

So if the declaration contains two causes of action & the jury find generally for the Off. altho in fact they found upon one cause of action yet further no action can afterwards be sustained upon the other - 2 Johns R 210
The whole matter having been submitted to them
If a Verdict had been entered as to some cause of action or it had been abandoned at the trial for a recovery in a former action apparently for the same cause it is only prima facie - 2 Johns R 229 6 M
607 But see upon action 3 Phil 304 Stetson & Campbell

New and Readings

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113 - £100 - 2 bils. 335 1 Sam. 169. F. 191. Sta 132. 1493. Lams. 49
But this genl. rule does not hold as to facts which are not transmissible
by plea however essential they may be - This qualification is
not attached to the rule as laid down but it certainly exists
- for in debt & assumpsit the consideration is the gist of the
action & must be stated in the declarⁿ - yet it is never
positively alleged - the declarⁿ begins "for that whereas the
Def^t was indebted to" - The reason of this is I think supposing
the ^{consideration} ~~plea~~ is not transmissible by plea because to traverse
it would amount to the genl. issue - So in trespass it is
indispensible that Off^r should state his ^{plea} ~~plea~~ but it is always
stated under the "indisput" by way of recital - So in an
action against a man for mischief done by his animals
it is necessary to state that Def^t ^{owns} ~~owns~~ his animals were
mischievous - the matter is the gist of the action yet it
is always stated by way of recital - "knowingly" because
it is not transmissible - 13 Co 13. 111 10 Co 77. Sam. 169. Com
288 - 4 Co 106. Plead ap^t - 10 -

The rule does not hold with
regard to mere matter of inducement - I suppose for the same
reason that it cannot be traversed. Yelton 70. Polk 177. 13 Co 13. 14
- If the declarⁿ is bad in part & good in part & Def^t answers to
the whole Off^r may remove on that point which is good if it
contains a complete cause of action & this rule holds
whenever there are two counts one good & the other bad - as
if in one count Off^r sues for two diff^t articles & describes one
ill & the other well & Def^t answers to the whole - Off^r has
judgt. for that which is well described - So if there were

Miscellaneous rules

2 350

Book 483

Barba S

2.1020

Assignments by way of inducement in the first count in
 default will not be a rebuttal count which is otherwise
 defective when it clearly refers to the first count
 which is good 20 Idem 344 2 Hk Bl 131 2 Wils 114 115
 Bro 2 240 2 Lev 193 2 Hk H 256 16 Idem R 348 3 Lev
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Miscellaneous rules

N But where the sum demanded depends upon a deed
or other instrument & in nothing extrinsic there can be no
remittitur for the variance which is made is inconsis-
tant with the instrument upon which the duty depends
1 Saund. 285. n. b. 2 Sed 159 St. & Mod 87 S. R. 814

Pleas and Readings

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These rules do not apply to criminal actions (13 Ban 985) for in indictments or informations the Court will give judgment upon the fact which is indubitable. - And they if the Jury assess greater damages than the Plaintiff demands, he may release the excess & take judgment for the residue - or without release the Court to prevent error may expressly render judgment for the proper sum - but if it is rendered for the whole it is error. Co. Litt. 19. 10 Co 115 5 Ba 195. 292 2 St R 113 1 H. Bl 648 1 Ba 215 -

N So also if the Plaintiff demands more than by his own showing he is entitled to & the Jury give the whole in damages, he may remit the excess & take judgment for the residue 1 Ba. 26 1 H. Bl 85 - Allegn 29 1 Ba. 282 115 - Co. Litt. 437

In certain cases

a defective declaration may be aided by a plea in bar. Co. Litt. 285 2 St. 76 2 H. Bl. 120. 1 Anst. 89.

Dilatory Pleas. L. 330

These are called dilatory because they were formerly used without any regard to truth but merely for a delay - but by St. 4 Ed 3 laws it was provided that no dilatory plea should be allowed without an affidavit of its truth or some collected matter which should induce the Court to believe it true. 3 Ba 302. 3 Co. Litt. 51. 1 H. Bl 152 1 Ba. 285 1 Ba. 282. Styler. 1135. 5 Alcock 335 This extends to criminal cases. 3 Ba. 117 - 11 such it is in Cr.

These Pleas are of three kinds - 1. To the Jurisdiction of the Court - the grounds of this may be various - In Eng^d - Def^t may plead some privilege - 2. To the title of any Count

Pleas to the Jurisdiction

Pleas and Pleadings

any Court of Westm Hall is held in any other Court except that in which he is an Atty - he may plead to the jurisdiction - where the Court is of limited jurisdiction this is a good plea if the cause of action arose without its jurisdiction or limits - by which is meant its local limits. 10th 11. 354, 3 M 301. Sel. 554. 2 Bulst. 207.

This privilege holds only in actions against him in his personal capacity - not when sued as ex^{or} or as Co-Def^t with another - nor when the suit brot against him is not cognizable in his own court - If the Atty is prosecuted criminally it must be in B. R. 11 Ba 367. Cro L 588 Sel 2

How far this privilege exists in the U. S. I do not know - In Ct there are no Atty of any particular Court - Another plea to the jurisdiction is that the Court has not cognizance of the subject matter - Where the plea is proper but not necessary - for in this case the action is coram non jure & their proceedings are void & should they render judgment against the party & he should be imprisoned he might have false imprisonment against the Jst or Sheriff - 10 Co 58. 15 Vent 333 1 East 352 1 Ch 430. Gill. C. P. 191. 11 Co - 206. 2 East 128

That the cause of action arose in a foreign country is no defect in transitory actions provided the Court is of general jurisdiction - A transitory action is one which may be brot in any place -

Pleas to the Jurisdiction

Where the cause of action is local or jurisdiction of the
magistrate is based the evidence must prove the cause
of action to have arisen in the place cited in the
declaration 19 Ke 241.

News and Readings

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If there is a suit contracted in Eng^d the action may be tried in any country - This is contrary to the old rule of C. S. which requires that every action should be tried in the country where the cause of action arose & that the Sarg must come from the neighbourhood - This is still the theory of the law. Ex. In Canada - to wit. in the County of Middlesex - But in local actions it is a good plea to the jurisdiction that the cause of action arose without the jurisdiction of the Court - Actions are local where the subject is local as in real actions, because the judge is to act in rem & when the subject is local the action is local altho the judge does not act in rem - as in trespass on land. Corp 161. 75. 81. 2 H. Bl 145. 161. To 146. Sauer 74. Kirby 25. 1 R. 430. Show. 191. Idol 80

Real actions are local tho they are civil in form - no man can be tried for an offence out of the country in which it was committed - Criminal actions are always local 4 R. 513. 546.

An action against an assignee of a lease or assignee is local & must be brought where the land lies - that is - in the County where the land lies - But an action on the contract against the original lessor is transitory for as to him there is no privity of contract with lessee - but a assignee is liable in privity of estate. 2 East 5. Gault 183 1 Second 341. 7 Co 2. Sauer 74.

This plea is first in order of pleading for the exception when necessary to be taken by when is waived by any other plea. But 125. 11 Dec. 7. 28. 35 Nov 764

To the disability of Pff

*If a writ of error be dismissed for want of jurisdiction it is
without costs 2 Wheat 368 qd do 680. do where an appeal
is dismissed for this cause - no costs. 7 Cowell 423*

*White 314
Mf. 207*

Rule of practice in England that a writ is not returnable, but is
 Laid by the Att^y - for the Att^y is an officer of the Court & if signed
 by him it is sufficient to be done with leave of the Court -
 (6. Hec. 146. 4 Ba 35) Or if signed by Att^y & presume it would be
 considered as an acknowledgment of the Court's jurisdiction
 - This rule is not observed in Ct. The plea is always signed by
 the Att^y.

Every plea to the jurisdiction concludes, to the
 cognizance of the Court - by praying judgt^h whether the Court
 will have further cognizance of the suit. 3 B. 303 Coult^s
 303. Inst. 298 Sumner 109.

All pleas must conclude by praying
judgt^h of that point which the plea is intended to raise
 - A plea in abatement prays judgt^h that the writ be quashed
 a plea to the action prays judgt^h whether I ought to have
 his action - In Ct. where an action is dismissed on a
 plea to the jurisdiction, Jst has his costs - Same where the Court
 dismisses its office - This I think is incorrect for the Jst
 of the Court in these cases is "that they have no jurisdiction
 of the cause" - but a judgt^h for costs is a judgt^h in chief.

2. Pleas to the disability of the Plaintiff

Some of these Ct. disabilities are of no importance here - but the
 as the first is outlawry - an outlaw cannot maintain an action
 in trespass or in his own right until the outlawry be reversed or
 a pardon obtained 1 Ba 2. Litt. p. 197. 1 Inst. 128. 3 Ba 112.

But he
 may bring an action in another's right - as, Ex^{or} &c. - But
 the outlawry of testator is pleadable to an action by his Ex^{or}.

To to the disability of Pff.

where the last became sides in the U. S. lot before June 4. July 1776
but the wife has continued in a foreign country. She is an alien
13 John & 29. and 22007 468

An emigrant here after the 27th July 1776 is an alien 4 John & 35

One who is a naturalized citizen cannot render himself an
alien by taking the oath of allegiance to a foreign power unless
he changes his domicile - 2 John & 407. 1 Bush. At 369 290 &c

A foreign sovereign may sue in our Courts if the subject
matter is cognizable in them. Code. N. 24. 1 Bush. At 133. 1 Roll.
532 2 Bush. At 322. 16 d. 78. 113 1 Ves. 373 1 Ves. f. 371 200
and contra 3 Ves. At 431 / Sums. under the foreign
government is authorized by our - Code. N. 24 9 Ves. At
347 102 353. 11-283-

A Contract in A. D. 3 John & 109. Debt can take no advantage of
alienage - contra as to alien enemies - 10th John & 183. / one who
resides in an enemy's country under a safe conduct
may sue & be sued 3 A. S. J. Ryuk. L. of war 195 1 White At
4 Bca 85-

Plas and Readings

for the disability goes to the person whose right is to be affected. 1 Ba 2 Litt 109 1 Inst 128 3 Ba 761

An outlaw may be sued for the object is to deprive of rights not to confer privileges 3 Ba 761. Voyt. 184 60.

Outlawry is always pleadable as a disability pcca 2 in some cases in Bar - Rule - When the cause of action is defeated by outlawry it may be pleaded in in bar 1 Ba 14. 3 Ba 761 1 Inst 128 5 Co 109. 29. Can it be pleaded in bar when the right of recovery is merely suspended - seems not

Another C.L. disability is Excommunication 4 Ba 36-

* So alienage is in some cases a disability - An alien tho a friend if not naturalized or made a denizen cannot maintain no real or mixed actions - tho an alien friend may maintain personal actions. (a) p 71. 3 B 384. 1st 371. 1 Ba. 438. 5 H. 18/162.

The C.L.

rules prevail in this & in most of the U.S. An alien may be enabled to hold real property by an act of the Legislature - In some of the Eastern States an alien may hold lands of course - Edw. Ency. tit. alien - An alien friend being a merchant may hold a lease of a house for years for the encouragement of trade - this is merely a shelter interest. Popph. 36. 1 Inst. 2.

12y H. U.S. children of citizens tho born abroad have the rights of natural born subjects - seems in Europe - So also children of persons naturalized here if they are under age

To the disability of Pff.

An alien enemy in Eng^d who is immorant by the
Kings license may maintain an action
Coop. N. 23 1 S. R. 282. 1 Cth. 42 1 Bos 163.

If alienage is pleaded to an alien friend it must be in
abatement. if to an enemy it may be either in abatement
or in bar 1 Cth. 16 1 Bos 85.

So if alienage is pleaded there must be a specification
that he is an enemy 1 Cth. 16 2 Bos 1082 1 S. R. 283. 853

at the time of their parents' naturalization & resident here have the same rights as natural born subjects. H. U. S. 6 Vol. 79.

Genl rule that an alien enemy can have no action whatever - his person is protected & for any injury done him which amounts to an offence the offender is punishable. H. U. S. 1092. 13a. 834. 6 S. R. 23. 49. 113 or 163 Doug. 626. 47.

In alien enemy may maintain a suit on a ransom bill - this is by the Law of Nations & the question is cognizable only in courts per se large Courts of Admiralty. Doug 619. 49. Burr. 134-

By H. 22 Geo. 3^d ransom contracts are prohibited they may take but not give ransom bills - There is an exception also in the case of an alien enemy residing here under a licence or protection or coming under a safe conduct - he has the same rights as an alien friend 1 Woy. 28 Sel. 46 8 S. R. 166. H. U. 1002.

Whether an alien enemy not thus protected can maintain an action as Ex. or Tamen is unsettled. (13a. 84. Cro E 142. 683 C. Cas. 5. S.) I think he ought not to be allowed such right - for every man who brings a suit is supposed to be present in Court - this would be to suppose a right in him to reside in the State & further alien enemies are never allowed to claim effects from the country.

In a plea of alienage the onus probandi lies on Def. 4 Ba. R. 98. H. U. 1082.

To the disability of Pff

Neither a present or E'stment can be sustained by
the committee of a deputation 1 Will 97, for the use of
the Licenser 24 March 85. Nor two, from to lands. Mutton
16 Popham 140 1 Brumlow & Goldb. 197 - & a license made
by the committee in his own name is void & the paper
is not bound by his covenants 2 Will 130 2 Lich & Lof 431
Stewart & Graham 19 Per 312

x The form of Pff must be pleaded in abatement. It is not ex
posed of record at the trial; 1 Sch. & 373 D.

L 366 -

Plas and Pleadings

There are other disabilities in Eng. as Præsumptio Ræpudi seems any attacks & offences against religion. We have nothing to do with any excepting Attaches and how far with this in the U.S. is uncertain -
 3 Bl. 301 2 380 4 Bac. 36

Coveture is also pleadable to the disability of Wf. - But when a female covert was alone the action may be defeated by plea to the disability. - Even when she joins with her husband 4 Bac. 443. 1 Inst. 132. 3 S. R. 631
 Law. 105.

It is pleadable in abatement by way of dilatory plea but is not pleadable in answer to the action - tho' if not pleadable in abatement the rule is reversed. (3 S. R. 631 Carth. 124.) It may be taken advantage of in dilatory pleading but cannot in general be alleged in any subsequent stage of the proceedings - this requires some qualification - see 6 S. R. 766 -

If a woman marry pendente lite her coverture may by C. L. be pleaded to her disability & for this the reasonable as for pleading in abatement. 1 Bl. 316. 4 Bac. 29. Sid. 140
 Law. 108.

By H. C. it is provided that in such case the suit shall not abate but husband may appear & suggest the marriage on the record & proceed with the suit - the action then becomes an action by herself & husband -

It is a good plea to the disability that Wf is an infant living without guardian or next friend - generally he must appear by guardian tho' in some cases he may

Pleas in abatement

If process is abated & may amend by paying to ^{the} ~~the~~ cost to that time / St. 24.5 / but any circumstantial defect is no cause of abatement. If the person & defect may be rightly ascertained by the Court / St. 25 /

So an action on ^{just} ~~just~~ a writ of error pending may be pleaded in abatement - not in bar / 2 Boh. C. 312.5.2. / & the Plea must state that the writ of error was not prior to the commencement of the action & that the requisite steps were taken to render it a supersedeas to exⁿ 192

Pleas and Readings

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apparently next friend - he cannot appear by Att. 3 B & 1248
3 B & 1203 Polm. 295 1 Inst. 135.

Another plea is that Pff is not
in spe - this is called a plea to the disability - Ex. Action
brot. in the name of a deceased person. Comd Abat. 8 B. 17.

1 Wils 202. 7 Ch. 435 - Lawes 104.

These pleas conclude to the favor
of Pff. by praying judgt. if the d & C B ought to be answered
Lawes, 103, 3 B & 1203.

Pleas in Abatement

The object of these is to destroy the writ (1 Inst 134) they
generally extend to the writ only - advantage of
defects in the declaration may be taken in another
way, 1 B & 15. Set. 298. 212 Comth. 172.

This plea can generally
reach the writ only - tho this is not universally true
- It is universally true that a plea which goes to the
writ is a plea in abatement - tho a plea in abatement
does not in all cases go to the writ - for in some cases
it may go to the count - as if there is a misjoinder in the
declaration - or a variance between the writ & declaration - so a
variance between the instrument declared on & the description
of it in the declaration may be taken advantage of by plea
in abatement tho this is not usual in Eng. 4 B & 8. 80. 2^d.
624 - Lawes, 105 - 5 Mod 132. 44 -

Certainty to a certain intent
is required in these pleas for they are not favored in Law.
3 B & 185 - 5 B & 187. 8th 107. Lawes 55. b. 107. 134 2 H B & 530 -

Misnomer

A plea in abatement, ought to be precise & with strict accuracy
Sept. 15 1841 I ought generally to give a better writ
Rule. If the Plea go to the matter & substance of the writ a
better one must be given need not be given - Securit must 1641
1 Day 29 2 Ct No. 379

A material alteration in *Off* writ after it has been
signed & issued & after security given to prosecute will
make it abate if such security was necessary
2 Ct No 379 & in the date of return

A Plea in Abatement is not Comovables 5 Mend 70 L 1440

Plas and Readings

Cause of abatement may be either extrinsic or intrinsic. -
Some defect appearing upon the face of the instrument or
writ - or some fact not there appearing -

Misnomer, is an ex-
trinsic defect whether that is in the writ or declaration
for it cannot appear on the face of the writ that the
party is misnamed but must be shown by averment
so want of addition &c - Lanes 102. 3 Ba. 54. Sedg. 381.
302. 3 East 167. 3 Bos. 547. - So also the omission of Defⁿ.
addition - which is the party's title trace estate & degree
& his place of abode - these are required in Eng^d by tt. 1st H.
5 - Been determined however that the addition of Defⁿ.
degree or trace with his present or last place of abode
is suff^t. (3 Ba 51) 3 131 302. Earth 14 Cr. 237. 2 How. 186)
This relates only to personal actions appeals & indictments
& not to real actions - Defⁿ person being sufficiently
ascertained by his propⁿ. 3 Ba 688. 6 Mead. 85 -

Act. C. S. neither
want of addition or name was pleadable in abatement
on an indictment for felony - for the person is not triable
unless he is present in Court & by his presence his person
is ascertained - hence by tt. 1st H. 5 - 1 How. P. 6. 238 2^d 176. 238
Vice. 40. 11. 4 Ba 38 - So mistake in addition is
cause of abatement - greater fault than no addition -
313. 302 Combl. 65 L. R. 1014 -

3 In Ct. the only addition necessary
in ordinary cases is that of Defⁿ. place of abode - the
here as well as in Eng^d - where one is used in his official

Mishmer

16h 441

2345.

capacity that addition is necessary. Ex. One sued as Sheriff or Ex. they must be described as such. 3 Ba 620 2 Vent. 84 - Cauth. 308.

Where addition by way of inducement is necessary it is more surplusage & will not vitiate if mistaken. Ex. Deft. is described as heir at law to S. S. - this is impertinent & makes no difference whether true or not (3 Ba 626. Cr. 2333)

Misnomer or want of addition of one of several Defts. cannot be taken advantage of by the other unless in cases where it makes a variance. (3 Ba 626. 47. 38.) Rule the same in indictments & other criminal process. 2 H. A. P. C. 177. 3 Ba 626

Unsettles whether if the writ abates as to one of Defts. for misnomer whether it abates as to all. By the weight of opinion it seems it does not. - Hence the true intention to be this - if the action is joint it would abate as to all - but if joint & several I suppose the writ might proceed against the one rightly named (Cauth. 96 - 3 Ba 617. 25 - & Co 159^e 4 Ba 45 -) I suppose the joint & several obligors are sued & one is misnamed. Can the suit proceed against the other two? I think not from the rule that two of three joint & several obligors cannot be sued tho the whole or one alone might.

Art. 61, The dignity or degree of a Peff. as high as a knight must have been acknowledged if it was lawe - & the same rule applies to 2^{ds}.

Mishmer

SR 115

2 Saur 209 b. 1.

The bear knows of no middle name but is content for the party to give their two names as well without as without it } 3 Saur 209 b. 1.

The omission of a letter which does not vary the pronunciation of the name is not a mishmer 3 Saur 209 b. 1.

Is a plea of mishmer a replication that Def. is known as well by one name as the other is good 3 Saur 209 b. 1.

13. go to this example for the word "said" admits Def. to be the person sued 1 Saur 394 b. 1. 188 1 Saur 10. / It should be by A.B. who is wrongfully named. 2 Saur 209 b. 1. 1 White 18. 188 and

Pleas and Pleadings

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H. H. H.

1 Com. 189. 2 Roll. 469. 3 B. 616. 4 Cal 561.

Def. who pleads

misnomer or the want of or mistake in addition must give 9th a better writ - he must set forth his right name &c. otherwise his plea is ill - & this rule applies to all pleas in abatement generally, tho' properly laid claims with reference to this, merely. 3 B. 624. 3 H. 515. Wills 554. Lawes 39. 113. L. 16 1178 Post. Pleas in 2d. 3.

Def. in a plea

in abatement must state not only that his name was not A. B. but that he was known & called by that name at the time when the writ issued & then must deny that he was known or called by the name by which he is sued. (See 67. Wills 544. L. 16 118. 249. Thim. 629.) & if Def. when sued by a wrong name pleads by the name by which he is sued he cannot afterwards state his true name but must introduce himself thus 13. "I the said A. B. who is wrongfully named &c." Lawes 92. 5. 5 B. 487. 1 Shaw 394. Com. 118. Carth 307. 2 Cl. 217.

Misnomer or want of addition even in general only, be pleaded in abatement - it is therefore waived by pleading to the action - This is true as to all matters merely abatable - Some matters of abatement may be pleaded either in abatement or to the action. 1 Roll. 750. Carth 124. Feb. 2. 67 R. 766. 3 B. 157. 623 2 H. 16/267. 299

If Def. is misnamed & recognition of bail is taken from

Misnomer

Def. can not p^ro. in debat. because of an alias distinct subjoined to
his name & the true name is that which precedes the alias -
2 Cases 4. 362. D. 2. 41 Solers 118.

If the surname of Oblige in a bond varies by a slight mis-
spelling producing scarce any change in the pronunciation
from that in the subscription he may be sued by the
name subscribed without an alias - 2 Cases 4. 262. D. 2.

Meas and Readings

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him by the name in which he is sued he is ^{not} obliged to
plead the misnomer in abatement & this is true tho
he was not party to the recognizance. 2 N. B. 453. 3 Wils 461
Sect. 8.

If one executes a deed by a wrong name he must
be sued by the wrong name & the 27th must follow it &
his true name come in under an alias (Strae 1218
3 B. & B. 16- 1 Bulst. 216 Pg. 273) I think the proper way
is to sue by 1st right name with an averment that
he executed the instrument by another name - as if
one is Junior when he executed & becomes Senior
before he is sued -

A mistake in 1st Christian name
either in pleading or in executing an instrument
is said by D. Coke to be fatal & that the true name
cannot come in under an alias nor an averment
made or eluce. I think the rule absurd - 1 Inst. 8.
5 Co 43 Strae 1218 Wills 554

The parties must always
be described by their proper names giving the firm
of a co-partnership not suff^{ce} - Corporations sue to
be sued by their corporate names only, 6 B. & P. 508
Leach. 244-

Def^t. need not for his own safety take
advantage of any mistake in his name or
addition - for if he is afterwards sued for the same
cause in his right name he may plead the
former judgt. in bar with an averment that

Coverture

If Def^t neglect to take advantage of minority by place
in abatement he cannot assign it for Error / birth 124 4 Dec
38 / but may be taken in ex^t by his wrong name
1 White 19 2 Stone 1218 1 M^p 76

If a feme sole ~~off~~ marry her suit abates 71. 2 360.

Deas and Pleadings

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that he is the same person who was sued in the former
suit by a diff. name. 3 Ba 626. Hce 1296

Misnam. of Pff.
is also pleadable in abatement & the same rule, holds
in case of Pff^{ts} (1 East 542) But a wrong addition
in the description of Pff cannot be pleaded except as
at C. L. - an omission of Pff is not within it. 1 Hb. - At
C. L. the rule was the same as, as to Pff's & Pff^{ts} any
dignity if a knight must be added -

In the count of Pff

place of abode must be stated & a mistake in it is cause
of abatement - An action was brought in Ct. by assignee of
a note in the name of promisee & in the declaration
stated that the Pff had removed & the place of his
abode was unknown to the assignee not asserting
that ^{assignee} he was assignee Pff - writ abated - Comb 189
2 Ro 11. 464 3 Ba 610 Inst. 561 & Moe 85 -

Coverture of Pff^{ts} is cause of abatement (1 Inst 132
1 Side - 140) But if a feme sole was pending
the suit the writ if rightly commenced cannot be
defected by her coverture Hce 811 L R 1525 1 Ba 960
Cro 1323 1 Inst 132, contrary 138. n. d. Ro 71

If a feme covert is sued alone she
must avail herself of her coverture by plea in
abatement - If she does not but pleads to the action
she waives the objection - There is a confusion in
the books on this subject - I think the rule

Coverture If an action of trespass for an injury done to the wife when she should be b'ed, by the wife alone - the coverture must be pleaded in abatement.
If not in law 3 N. 627 White 7.

Marriage of female If after coverture no cause of abatement for after co'it any thing which abates the writ cannot be pleaded in abatement. 5 Rep. 111. no day in court 1602 102 Cr. b.
232 12 Johns R 219 12 5 do 393

c. to toe if a person under the care of a curator is seized. P. 66.

Pleas and Readings

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cannot be laid down - the husband if she does not plead it may afterwards appear & allege it in law - or move it in arrest of judgment - or if judgment is rendered may bring a writ of error (1 Bos 29, 29 Latch 34, 1 Ser. 460. 1 St. 254, 3 Br 651. 5th 681 Exp 12. 16. 19.) A writ of error is but wife must join in it with husband (3 Br 16) The writ of error in this case is usually coram vobis for the error consists in an extrinsic fault - there is no error on the face of the record - it must appear in argument & there is an issue in fact to be tried.

If two are sued as husband & wife when they are not it may be pleaded in abatement (Lewes 105) But that plea is an infant is no ground of abatement tho he is sued without a guardian - Infant may be sued alone at law tho he must appear by guardian or next friend - & the guardian he should be summoned & if he is not & if he is not time will be given to summon him - If he has no guardian one will be appointed ad litem - If judgment is given without any guardian it is erroneous, 1 Ser 135 5 Co 53 3 Br 447. 1 Bos 104. 194

If an infant is sued on an obligation of his ancestor his infancy shall not abate the suit but the parent shall demur - i.e. the proceedings shall be stayed till the infant attains his full age Lewes 105. 11 East 485 1 Br 174

Death of the Parties

The death of Rep. in Exch. n. t. does not abate the suit.
Sta Solus 3495-21.

The civil death of Def. abates the suit $\frac{1}{2}$ Solus L. 408. D. 1. / Ex conf-
uted to State prison for life - qm. if the cause of action is such
as would survive agt. his Ex. & L. 368. 369

Death of the parties. At C.L. if a rule ~~off~~ or ~~Def't~~ died pending the suit it is ipso facto abated (1 Inst. 139. 10 Co 134 Ba 7.8) & if one of several parties died except in personal actions after summon & service the rule was the same. But in real actions there was no exception to the rule. Reason of the distinction is founded on the particular theory of real actions 1 Ba 7.8. Doct Pleas intro. 3.4. 10 Co 134 - C² 26

The genl rule with respect to the death of parties was at C.L. the same the one of ~~off~~ died after verdict & before judgment but there was the same exceptions in personal actions as before (3 Ray 463) But if one of several ~~Def'ts~~ died the rule generally was that the suit should not abate. It became necessary for ~~off~~ to suggest the death of the party on the record & then proceed against the survivor. 1 Ba. 8. 4th 42. 3 Mod 429. 1 Show 186) Without such suggestion the judgment would be erroneous & if judgment was against all one being dead it would be erroneous per judgment against a dead person is erroneous - Cautio -

Now by Sts 17 Car 2 & 229 Hen. 3. & St 6th 223 - this inconvenience of abatement by death of parties is in a great measure obviated so that now when there are several ~~off~~ & one dies the suit does not abate if the cause of action is such as would survive to the other & this will be the case in almost all personal actions - so in case of ~~Def'ts~~ if the cause of

Death of the Parties

6 Discharge of Pp. since the indictment here after suit commenced will not
state the suit 16h 114 30 R 438 12 John R 490

Wills and Readings

No 5.

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action would survive against the executor in both cases the death being suggested on the record the cause will proceed.

4 Ba 42. - 2nd ed 115.

Under these Hs. if a sole P^r or P^r die pending the suit when the cause of action would survive to the ex^r or P^r or against P^r Ex^r the Ex^r of P^r may enter & proceed with the cause - or if P^r die in this case P^r may take suit a sci. fac. against P^r Ex^r - Our H^{ts}. holds in whatever stage of the proceedings the death may happen - In Eng^l the suit is not kept alive unless the death happens after some interlocutory judgment - If a sole P^r dies his representatives enter & prosecute merely suggesting the death on the record - But if P^r die a sci. fac. issues against the representative requiring him to appear & shew cause why judgment should not go against him - A sci. fac. must issue for the Ex^r of P^r is not bound to look after the suit - Suppose there are two original P^rs both of whom die at diff^t times pending the suit - the H^{ts}. does not say who shall prosecute - I think it is clear the surviving P^r has the whole remedy so the action must survive to his representatives - The Ex^rs of both original P^rs cannot join - I so in case of P^rs.

Real actions still abate on the death of a sole P^r or P^r - for they are not within the H^{ts}. - the H^{ts}. speaks of Ex^r & Ex^r in 2nd of the line of course the rule is the same as, at C. L. 13 a. 9. Co L 812. 1 Inst. 139.

Parience. If a dec^d survives until the writ the executor may

Variance

where an instrument is set forth in the declaration which need not have been set forth the court may reject or void which if retained would make non-sense / 18 W 239 /
 being of the instrument set forth is necessary to the cause of action 1 W 239 2 Doug 642 10 also Camp 230 2 Dou 133
 2 Str 1135 1 W 162 3 W 643 4 528

where the omission of a letter does not change the word so as to make it another word the variance is not material / 2 Str 660. Camp 230 / being of the variance is in a material part in Camp 230 2 Str 660 3 Str 56 Cr 3
 135 3 Co 245 2 P 1224.

The contents of a promise must always be stated in the declaration whether the promise be in writing or not for there is more than one variance the whole must be stated or there will be a variance 6 East 570
 8 Co 12 ac 3 3 Chanc. R 286 2 Dou 22-

Antient of Saunders allegation that the words were spoken of as a complaint made by him before Justice in 20ollar proof that writ was made 8.ollar variance not material
 20 Johns 351

An omission of the words "in order" of the time of payment / place where it failed in a declaration of Wheat 558

An agreement that the note was assigned - "for value received" is an immaterial one and need not be proved 3 Br 193

Deas and Pleadings 8 11 170

be pleaded in abatement - as if the writ grounds intrapass
on the case & the declarⁿ in the pass is at issue 11 B. 1249.

Yelot. 5. 5 R. 222 4 East 589. 1 Bos. 19. 2 Wheat. 45 11 do 280

Where the variance is in
form a plea in abatement is necessary - but when of substance
this plea the proper is not necessary for the judge may
be arrested or the suit dismissed & of course by the court - but this
is matter of practice in Eng^d. it appears the last rule is
not observed for the court may or may not at their discretion
grant Cert. over of the writ - Yelot. 120. Saiter 175 Hob. 279.
Cro E. 22. 126. 85. 96

When there is a variance between the
instrument declared on & the one given in evidence it
is always a good cause of abatement - (6 Co 14 2 Bils 232
43 R 314 1 Bos. 87. Com. D. Abat. E. 12. Coups 55) In this case
the usual mode is to take advantage of it under the genl.
issue & in this way it works a nonsuit (1 R 656. 4th 612. 87
1 Saunders 154 Coups 56. 1 Bos 11. 87. Syst. of R. 1.) In Ct. advantage
is generally taken of this defect by plea in abatement & this
may be done in Eng^d. Com. D. Abat. G. 1. Act. N. 12. Sed. 659.

Advantage may be taken of this defect - 1. By plea in abatement
2 By evidence under the genl. issue - 3. By excluding the instrument
when offered in evidence - 4. By reciting it on over & then
demurring to declarⁿ. - The principle on which it is proper
to demur to the declarⁿ is that an instrument recited
upon in declarⁿ being on over recited then becomes a part of
the declarⁿ - it stands on the same ground as if the instrument.

Non & musscinder

An can action against him upon a note which on the face of it is joint & several & so declares upon it is not a material evidence that before ages it appears to be signed by one only for himself & partners 1 Root 119~

one of 5 partners executed a lease for the partnership asset & C. became his surety. The partners signing the lease died & then the surety paid a part of the lease. Then another of the partners died & then the surety paid up the lease & lost his action against the surviving partners for money paid as for the use of all the copartners in the life time of the deceased partners & the promise void as made by all in their life time. held that this proof was variant from & did not support the claim. 2 Johns R 214.

that the promise was made by Deft. & one of P^s jointly must be proved in absence of 3 claims 299.3 via 2 R 1887. But if this fact appear on the face of the Receipts or exchange may be taken by clearance asset of Deft or unit of error
1 Ch 29th 1841 & 284 n 4 154 n 1 291 B n 4. 5 2 R 651
4-725 1842 20 2 R 16 947/ 1 Sauter 291 B n 4 154 n 1
1 Bos 73 7 R 596

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had been recited at length in the declaration originally made.
339. Hol 18 Bull. 213.

So if a misnomer works a variance.
advantage may be taken of it under the gen^l issue. Suppose
A. having executed a bond in his right name is by
mistake sued on it in a wrong name. Def^r may plead
the gen^l issue - non est factum - 1 R 656. 2 R 612.

Nonjoinder and misjoinder are also causes of abatement
- Gen^l rule that if one sue alone when several should join
the nonjoinder is always pleaded to be in abatement. But
195. 64. 1 Salk 4. 1 Saund 191. 11 Eas 1. 1 Curies, & if two
or more sue when one only ought the misjoinder may be
pleaded in abatement. Hol. 72 C. 0 E 143. 1 Leon 315.

When the
objection arising from the non or misjoinder goes in denial of
the declaration advantage may be taken of the misdo here and
the gen^l issue or in abatement - for whatever goes in denial
of the declaration will always support the gen^l issue - as
if in an action on contract one sue alone when another
should join - the nonjoinder may be taken advantage
of under the gen^l issue - for the objⁿ goes in denial of the
declaration - or if the action is founded on a written contract
Def^r may come over & demur. Bull 152. Hov 820 1 Bos. 5. 1 Saund
153. 291. 2 R 282.

Rule the same where the promise is made to
one & promisee joins another with him in the action - for the contract
on which the action is founded is not the contract made -

Non disseinder

A ~~share~~ 1/3 share 1/4 share & discountage can only be taken of it out of
only in mitigation of damages &c.

Said in 5 Hill 58 that when the coven relates to the
realty tenants in common must sue separately
when in the personality they must sue jointly
& that in coven of repair, or recurrence to the
land in Ry. they must join at the C. E. they
may 10 Reg 80 15 Letham 479 8 Cows 304 1 Lev 109
5 Mod 64 1 Ch 113, 75

If all tenants in com- do not join in trespass the non joiner must
be placed & cannot be taken advantage of at the trial 18 Reg 104
& 151. / q- not in mitigation of damages? suppose it
appears from the depositions that all houses not joined? &c

White 26 2. M. 509 - 5 do 228

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if one sue alone on a contract when another ought to join & this appears on the pleadings of P^f. the mistake is fatal & Def^t. need not either plead the gen^t issue or in abatement - he may demur or if verdict is given against him he may move for judgment. 5 Co 18. Sta 1146 1 Saund 153. 291. d^r.

2 But if one sue alone ^{intort} where another should join advantage must be taken of it in abatement for here the objⁿ does not deny the declaration - there is no variance in the case of torts - As if A enters on the land of B. & C with force & B sue, alone A. must plead it in abatement (63 R 766 Sal. 290 Sta. 820. 1146 5 B R 649. 5 Co 18 Sta 420 1 Saund 291 Peake. 6205 -) This even in actions sounding in tort if two sue when the right is in one only advantage may be taken of it under the gen^t issue - There is no variance for variance relates to the terms of the contract - But the fact that one only has the right goes in denial of the declarⁿ & therefore supports the gen^t issue. 5 B R 200 Cro E 1433 East 707. 16 M 74 10 E 210 14 E 428. 152 5 Hill 58 & n

If one joint owner of a chattel sue alone in tort & Def^t does not avail himself of the nonjoinder by plea in abatement the other joint owner may have another action against him for his own damage. 1 Exp. 6 216 2. 586. 622. 7. 3 R 361. 379 and a sup 509 White 26

If one of two joint debtors is sued alone on contract the nonjoinder must be pleaded in abatement & if not it is waived unless it appears in the pleadings of P^f that there is another joint debtor.

Non & misjoinder.

28th Nov 213

If one part owner of an article stands by & permits the other to sell it expressing to look to him for payment, he who sells may bring an action in his own name for the price - 6 Wend. 397

* In 5 Burr 2614 it was decided merely that if one of several partners are sued for a partnership debt advantage could be taken only in abatement.

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Bun 261. 2 Bl R 947. 5 Bl R 656 B. 327. 69 2 N R 365 456 Comf 832
1 Saund 291. The rule is the same as to actions
arising ex quasi contractu. Saund 291. East 62. 6 Bl R 389. 2 N R
365. 3 East 62. to 72.

Reason of the rule is the same as in case of
P^{ff} - the objection arising ^{from} the misjoinder or nonjoinder does
not deny the debtors - here there is no variance tho it is
matter of contract (3 Ba. 698 5 Co 119 Went. 34. 2 Bl R 950
1 Bos 72) A. & B. make a joint promise & he is sued alone now
unless he pleads in abatement judge must go against him -
he cannot plead non assumpsit for the A & B promised so
vice v. therefore there can be no variance. 3 East 70.

If it
appears from the P^{ff} pleadings that there are others liable
jointly with P^{ff} the nonjoinder is fatal & cannot be
aided by verdict 3 Bun 2614 Went 34 9 Co 52. Saund 291

These distinctions as to nonjoinder of parties jointly liable
hold in case of joint & several contracts by three or more
& two only are sued - the mistake is pleadable only
in abatement except in the case last supposed -
Saund. 291.

- But if two are sued on contract when
one only ought to be sued it may be taken advantage
of under the genl. issue - the misjoinder may be given
in evidence (1 East 48 2 Day 272 2 N R 454) & in this
case if verdict is found against one & for the other
the just may assist judge because the verdict negates

Pendency of a former suit.

P. 47

127 R 47

A plea of another cause of action pending is not available.
plea tho' pleaded in the form of a plea in bar - for it is still a
plea in abatement. 3 Selens R 269 D2.

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the declaration. Carth. 361. 1 Kel 284 3 East 62 5 C. 1047.

But if two are sued for a trespass committed by one only there is no misjoinder the wrongdoer may be convicted & the other acquitted for all torts are in their nature several. - Rule - When several have committed a wrong all or any may be sued (Str. 993. Esp. 336 8 Co 159. Str. 420 5 Ba. 185. 92.) If then one of several wrongdoers is sued he cannot plead that another was party with him - Exception in cases an action sounding in tort concerns real property holden by two jointly both must be sued - because of the jointtenure - the nonjointdoers must be plead in abatement - 5 B R 657. Scum 296. 2 B. 1. 182. Corn. P. Abat. 36.

Pendency of a former suit for the same cause of action between the same parties is a cause of abatement (1 Ba 13) both suits must be of one kind or concurrent & for the same cause of action -

But in an action of Ejectment by Mortg. vs Mortg. is not pleadable in abatement in a subsequent action on the bond given to secure the right - Mortg. may pursue both these remedies & also bring a bill to foreclose (5 Co 61 4 B 3 Pau M.)

This is a good plea in abatement that the prior suit is pending in another court & is left in Cur. when the prior suit is pending in an inferior court it is not pleadable in abatement of a subsequent suit in a Superior Court 4 Ba 48 2 Wils 87 5 C 62.

Not necessary that

Pendency of a former suit

Where def^t pleads another action pending of any circumstance
the first suit without leave of court or judgment of facts. 1 John. & 397
St. Coleman 94. v. 2.

Pendency of another action for the same cause between the
same parties in the courts of another state no cause abates.
19 John. & 221/ even the in one of the U.S. Courts 12 Idem,
106. v. 2. 4d 483

Real & 227.
2. 261.

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the first suit be pending at the time of pleading in abatement to the second - suff. if the first was pending at the time the second was commenced for if this was the case the second was repetitious on which ground the same general rule is formulated 1 Bos 13. 1 Cr 143.

Suit is considered as regularly commenced from issuing the writ. 1 Bos 11 Cr. 67 Cr 11 Buss. 1423 Coups 1474 -

Holden in Ct. that if it can be shown that if the first suit must have been wholly ineffectual its pendency shall not affect the second for in this case the second would not have been repetitious - so if misconceived. (Root. 365-562. 155-) I think it may be laid down as a genl. rule that the pendency of a former suit will not abate either one unless the latter is repetitious - In the actions of book debt there may be cop suits of course the pendency of a prior action of book debt by C. vs. B. is not pleadable in abatement in a subsequent action of the same kind Buss. Cr. 1 Root 155 - Nide 13th 227.

This plea in abatement avails tho a new Def^t be added in the second suit & the weight of opinion is that the second will abate as to both Def^{ts}. (1 Bos 49. Gault 967. Holt 137. 1 Show 71. Gaulty Holt -) & the plea is good when the action is brought against but one of several former Def^{ts}. 1 Bos 13. 114.

If the second suit is commenced on the same day on which the first is abated the second shall be presumed to be sued out after the abatement of the first & I do not

Unduly issuing the writ.

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not find in the books that this presumption can be rebutted
1 Ba. 14 All. 34 Gill. H. C. R. 260

It is no cause of abatement that another
action is pending for the same thing against a stranger (stra.
120 H. d. 137.8) Neither is it a cause of abatement to an
indictment that a former one is pending against Post.
for the same offence for the Court has a discretionary control
over indictments & will quash one usually the last. But
in case of informations the court have not this control
for individuals have an interest as well as the public
2 H. aw 190. 275. 351 1 Ba. 13-

If two informations are exhibited
by diff. persons on the same day against the same Post.
& for the same offence each will abate the other &
there can be no final judgment - for informations are
without any strict justice & the Court will not enquire
which was first but will allow the maxim "that there
is no fraction of a day" to prevail. H. d. 128 Moor 864.5

Unduly issuing the writ is another cause of abatement
& so in gen^l is any irregularity or informality in the writ
Lewes 106. Comp. 66th H. 1

If a writ is made returnable to
any other than the next succeeding term of the Court
when there is suff. time for legal service before the next
term the writ is void & the officer who acts under it does so
at his peril (2 Wils. 341. Sed. 700. 1 Root. 315) The reason why
the writ is void & not merely abatable is because it is

Unduly issuing the writ

Def^t a lease wth Off^r. that he the Off^r paying rent &c
should have quiet enjoy^{mt} of a term upon an underlease
in commission at a day Subseq^t. Def^t before the day perfected
his own term by non payment of his rent & that Off^r could not
come into possession of the underlease. Motion that he could not sue
on the w^{rit} until the expiration of the term upon the commission
was to commence 39 C. L. 247.

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indispensable that it should be void otherwise it might be made returnable at any indefinite future period 2 Jeff. would be held in prison during P's pleasure - If the writ is not served by proper authority it is void - So also if it wants a date, or has an impossible date it is abatable 1 Show 80. 2 Lev. 2. Cr E 592 1 Sid 304

Rule of practice in Eng^d that a writ is not amendable. 1 Show 80.

If the writ has a defective return it may be abated. Cr. E. 50. 1 Sid 63 1 Sid 406. 1 Sid 468. So if the service of the writ is on the face of it defective it may at C.L. be abated - But if on the face of the writ the service appears to be regular tho it is not so in fact it cannot be abated for this cause - for at C.L. the false return of service cannot be contradicted by plea in abatement - the party injured may have an action against the officer (11 Jac 813 134 R 393) Secus in Ct. his return may be contradicted - The rule of Eng. practice is founded on the principle that an officer out shall not be contradicted except in an action expressly brought for the purpose of contradicting it -

In Ct. if property is attached 2 mo copy of the writ left with Def^t the writ may be abated for this defect of service (1 Root 128. 563. 2^d 130 346.) But if read it will be considered as a summons By our St. 35th 158 when land is attached a copy of the attachment with the proceedings upon it shall be left with the town Clerk that all persons may know

Want of venue. Misconceiving & Prematurely
bringing the action

While one matter is now pending, it is dangerous when another
is another County. It may choose which County he will bring
his action & Mr. McCargue & Co.

If goods are sold on a credit tender cannot bring
a complaint until the expiration of the credit tho' the goods
were purchased fraudulently - if he proceeds on the contract
he is bound by all its terms & if he re^d repudiates it
he re^d being times 146 & 387 - assembling 50 R 175

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that the land is attached - but an omission of this is no ground of abatement.

Want of a Venue in a writ or declaration is cause of demurrer (5 B. 323 & 1 B. 243) tho' at C.L. a wrongful venue of the venue is cause of abatement & there must be a venue for the sake of form - But Pff. may now in transitory actions lay his venue where he pleases (1 B. 245) but where the cause of action arises in one County & the action is brought in another the Court may on motion change the venue - but it is discretionary with them & there must be some special reason. See 669. 1 Sid. 124 Com. 510. 3 East 329 1 B. 20. 245 Lamer 74 -

In local actions a venue must be laid & that too in the County where the land lies for the action must be tried in the County where the land lies. 7 Co. 23. Cond. 17. 1 B. 34 H. 6. 34 -

Misconceiving the action is a cause of abatement - but advantage is seldom taken of this defect by plea in abatement - generally done by demurrer - It can seldom appear from the writ that the action is misconceived - tho' when it does it is pleadable in abatement. 16 d. 199 Lamer 106 Cond. 66. Att. 60.

Prematurely bringing the action is cause of abatement - this seldom appears on the writ but when it does it

Mode of Pleading

If the plea is "I demand he pray judgment" it is bad - if the - later... 10 John B. 49 }
most proper way to take advantage of such is by special demurrer 2. E. 312. 3
2 John E. 312.

If a plea which contains matter in bar of an action concludes in abatement it is a plea in bar - for if it has no cause of action he can have no right - just - in relief - So if the plea contains matter only in abatement I conclude in bar it is a plea in bar & final judgment is rendered for his conclusion. Def. admits the writ to be good. 2 P. 1018
b. 113 P. 239. 12. 524 Cro. E. 202 1 Sid. 189. 2 Sam. 209 d.
m

* If a demurrer to such plea concludes in law judgment is final - 10 John B. 49

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is cause of abatement. 2 Lev. 322. Cuth 114 L 328

Mode of Reading and its effect

These pleas regularly begin & conclude to the writ over the cause may be the declaration (3 B 1 303 5 Mod 102. 444 Lanes 108. 60.) When the writ is such that it would abate without plea if the plea is made it concludes with praying whether the Court will proceed Lanes 117. 8

It is said that the character

2 of a plea is to be determined by its conclusion only - I think this incorrect (Lucas 112. 11 Bar 50 10 Mod 112) D Holt says its character is to be determined by its conclusion & ~~beginning~~ beginning - that when they are alike it is decisive whatever the subject matter of it may be. D. R 595 - Sid. 584. 91. Lanes 107. 4 Bar 49.

When the beginning & conclusion differ reference is to be had to the subject matter of the plea & that must determine its character D. R 543. 1088 2 Sams 209. n. E.D.

If matter pleaded is good either in law or abatement & the plea begins in law & concludes in abatement & concessio Off may answer either in law or abatement - If he answers in law & prevail judgt. will be in chief - if in abatement judgt. is respondent overster de. (Vent 136 3 Mod 285 - for the form vid. D. R 1153. 7. 92. 16 Lanes Aff 7.

A plea in abatement founded on matter which goes only in law cannot stand

Mode of Pleading

A plea in abatement on the ground of pendency
of another suit must be pleaded before trial
per recordam - 1 White 29 1 M^p. 495.

So if pendency is pleaded in abatement of a
quit claim action plea must show the
particular time when the other action was
commenced - 3 Binn 11/23. See also unless the
action is proposed

Judgement

A plea in abetⁿ after a plea in chief is a nullity, 1 Hen. 6. 100

120. 613

e. vid. 120. 191 That the justice where the plea is insufficient, should
be respondeat, and the question was, respondeat or not 2^d.

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Def. may plead in abatement as to part of the claim & demand as to the residue. Cases 107. 2 Bos 420

A plea in abatement does not regularly go to the merits of the case a judge upon it does not regularly go in bar of a subsequent action for the same cause. 1 Bos 29. 4 Bos 36. 746 3. 375. Vent 170. Com. D. 114. 1. 1. -) This is a genl. rule for these cases some cases where a judge on a plea in abatement goes in chief & to the cause of action - as always in a real action -

Judgment on a plea in abatement when for Def. is that the writ be quashed - under St. Jeoff. 174 - may often amend - but I am stating a case where there is no amendment - Vent. 222. 2 Shaw. 42. Yelut. 112 - 4 Bos 51.

When for Pff. on a plea in abatement it is diff. in the two cases of judge on demurrer to a plea & on an issue in fact - if the plea is overruled by demurrer judge is "respondeat auster" (3 Bos 303. 396. 7. 2 Wills. 367. 1 East 542. 11 - L. R 596. Vent 22. 1 Bos 51 Shaw 44) But when issue is joined on matter of fact in a plea in abatement & found for Pff. judge goes in chief. Yelut 112. 1 Bos 15. L. R 594 S. Reg 189. ut. supra -) & this rule it is said is intended to operate penally on Poff. for making a false dilatory plea but a better reason is that Poff. is entitled to one trial only by law - this rule in favorem vitae does not hold in indictments for capital offences. 2 Hawk 334. 54 1 Bos 15 - 2. 51.

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If matter of mere abatement is pleaded in bar in which case it must be ~~pleaded~~ ~~or~~ ~~overruled~~ ~~judgt.~~ is in chief as it always is in a plea in bar. It must have judgment in chief. L. Ray. 1022. 1 East 634. 1 Ch. 1145-

When P^{ff}. is convinced that the plea in abatement must prevail he may pray that his writ may be quashed that he may sue out another writ against D^{ft}. & prevent the expense of a trial on the old one. Sic. 633. L. v. 156- Rule that D^{ft}. cannot demur in abatement - i.e. matter of abatement is no cause of demur - for a demurer goes to the pleadings & not to the writ & if D^{ft}. demurs for a defective writ judgt. goes in chief against D^{ft}. (Gill. C.P. 208 L. v. 172, 1010, 119 1 Ba 15 Sed. 220 6 Ill. 10. 198 7th 97. Contra Howard, 73 -) This rule lieth, also in criminal cases - but in indictments for capital offences judgt. cannot go in chief on demur where the defect is merely abatable. 2 How, 334 -

After judgt. of responsiveness as to a second plea in abatement shall not be received - D^{ft}. must then plead over to the action - But if a dilatory plea of the second class is overruled D^{ft}. may still plead a dilatory plea. of a subse^{pt}. class in the order of pleading otherwise the rule of L^d Coke that D^{ft}. may use divers of them in their proper times & pleas will have no operation Hob 126. 2 L. v. 40.

After judgt. that the writ abate

3. P. Ct 68

1 Cl 4212

2 Secund. 1. m 2

638 369

4 Do. - 520

7 Do. 4472

See the form of a Special importance in 2 Cl 408

288 1094

2 Secund. 1. m 2

1 Cl 424

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if it is amended Def. may plead in abatement de novo or any other dilatory plea of the same or another sort - for the amendment makes it a new writ & Def. may have made some new mistake - but unless the amendment has raised some new objection Def. is stopped by his former plea from using any of a prior order which by his plea he has waived. 12 B. & C. 113 13 B. & C. 57. As to time of pleading see 1 B. & C. 316 2.

After a genl. impeachment Def. cannot plead in abatement unless the cause of abatement arises afterwards. for by a genl. impeachment he waives all causes of abatement. What is a genl. & what a special impeachment. 11 B. & C. 29 143 Luck. B. 130 3 B. & C. 316 1 B. & C. 9.

A special impeachment contains this or a similar clause "saving all advantages as well to the writ & clerks as to the jurisdiction" - A genl. of genl. impeachment contains no saving clause - after a special impeachment therefore he may take his exceptions at the next term after the intercourse is over. 12 B. & C. 291 12 B. & C. 200.

4 - When the time of pleading in abatement has expired Def. will not be allowed to plead this plea unless the cause of abatement has arisen afterwards. In Eng. the time for making this plea is four days - In U.S. the time is sup. c. 5 till the opening of the Court in the afternoon of the second day - in County Court they exercise in the morning of the third day - 11 B. & C. 314 12 B. & C. 173 12 B. & C. 173.

Pleas to the action.

Where the condition of a Bond is for the payment
of an annuity, Off must assign a bond. See
187. n2 8 T.R. 126 Lewis in N.Y. where the condition is
to pay a certain sum by installments of Bond 331
but must assign where the bond is of any other
kind if he does not he is not entitled to move
nominal damages. 5 Hill 39 7 Bond 345

After pleading in bar it is too late to object to the
jurisdiction 3 John & 105. D.

16h b30
b31.

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Matter of abatement cannot be pleaded in any form after the rule is out unless it goes in bar & then must be pleaded in bar Hold 777. et. ut sup.

Determined by our Sup^t C. that a plea in abatement not answered was considered as answered to - but this is not the modern practice - it is now considered as traversed the in truth it ought not to be considered as answered at all Hold 49.

Said in some books that there can be but one plea of juris dictionis continuance - or of new matter arising after the rule is out - this is said to be made that the party need not be delayed in infinitum - If new matter arises after the second plea & it ought to have an opportunity of pleading it Gill - C.P. 105 Barrow 174 -

Pleas to the action

There are of two kinds - the Genl issue - & Special plea in bar - The genl issue as well as a Special plea to the action is a plea in bar. In common parlance the Genl issue is often considered as distinct from a plea in bar - the word issue in law is defined to be "a single certain & material point issuing out of the allegation of the parties & consisting regularly of an affirmative & negative" - I think the word "material" improper & improper for if an issue is necessarily a material point all the pleas are material issues is unless. 1 Inst 126. Conditio No. R.

Pleas to the action

By pleading in chief ^{Def^t} admits the due appearance
of ^{Def^t} 7 ^{Lib^t} R 373 Dk.

16h 630

16h 557

Can issue should not be on a negative pregnant
16h 631. ~~16h 516~~ / tho it may be on a disjunctive
16h 631. Can D. 4. R 7. / 8 / joined on a negative
pregnant advantage must be taken by answer
Can D. 4. R 5. b. Can 4. 1 b 2. ^{16h 631} 319 u b. 16h 631 239.

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Object of pleading is to bring the parties to a convenient issue - According to the old strict rules of C.B. there must be a direct affirmative & negative to form an issue & in general sustains the rule at this day - in general two affirmatives or two negatives tho repugnant to each other cannot form an issue - been holden that if one pleads I.S. is dead - the other that he is alive it forms no issue - should have pleaded that he is not dead - (2 Bl. R. 1312 - Went. 253 - 1 Inst. 212 126. & 3 R. 278 . 5 Com 142)

This rule has been somewhat relaxed in Eng^d - holden that to a plea that he was born in France or replication that he was born in Eng^d was suff^t to form an issue & in that case the Court laid down the rule that if the second plea is so contrary to the first that the first cannot in any degree be true the issue is well founded - But the plea ought to have been that he was born in France allege hoc that he was born in E. 1 wills 134 that 1177.

In a writ of right the general issue consists of two affirmatives - this case has always formed an exception to the general rule - In this case demandant counts that he has more right than tenant & the tenant's plea is that "he has more right to hold than demandant has to demand" - 3 Bl. 305 - 1 Tra. 1177. Lames 232 -

Safest to do the pleadings according to the strict rules of C.B. - no advantage can then be taken of it -

Issues.

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164⁴⁷⁴ 512.513⁴⁷³
 164⁴⁷⁴ 512.513⁴⁷³
 164⁴⁷⁴ 512.513⁴⁷³
 164⁴⁷⁴ 512.513⁴⁷³

Pleas and Pleadings

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Issues are either in fact or in law - Issues in fact are either genl. special - or common according to Lanes - this division holds in all cases except for covenant broken - Lanes observes that there is no genl. issue for covt. broken - non est factum denies the ex^{ist} of the deed & not the breach - that he calls a common issue - True the plea does not deny the damages arising from the breach but as it does deny the ex^{ist} of the covt. there seems to be too much refinement in the division - immaterial 4 B & M. Lanes 100. 3 Tidd 587. 93. Rep 282.

Genl. issue is a denial of all material allegations in Pff declarⁿ. 3 B & M 305

Special issue is joined upon some particular part of the declarⁿ or upon some particular matter alleged in the cause of the plea and pleadings - every issue in fact except the genl. issue is a special issue 1 Inst 126 Lanes 113. 115 5 Com 142

Issues may be taken on pleadings which follow the declarⁿ - & these are called issues - without the addition genl. or special - These are allowed when taken to test to that to which the genl. issue might be taken - thus a denial of the plea in law is called a law issue Def^t may plead to a part of one count that he has paid it & set to the rest to show it. So he may traverse a part & claim to the residue -

Issues.

If Def. do not appear If more strike out all the pleadings & enter judgment as for want of a plea - 5 S.R. 152.3.

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Homer. 254

No. 362

Gr. 910

To cition on any misfeasance the gen^t issue is "not guilty"
 To debt on simple contract "nil debet" - to debt on specialty
 "non est factum" - to debt on jury^t "nil tid record" - to an
 action of account "never bailiff or receiver" - to defendant "non
 apum p^{re}it" - to replenin "non opit" - to Cipeis in which is brot
 for an ouster of a freeholder "nil dep^{re}is in" - to Ejectment
 whic is brot for ouster of a term of years "not guilty" - to an
 action of a warranty of a personal chattel "non warrantant"
 (3824. E.R. 500. 11 Int 126 4 Ba 52)

To debt on penal Stat. not guilty is a good plea tho "nil debet"
 is the appropriate gen^t issue - first is good because the action of
 debt arises ex delicto - Def^t denies the offence & thus denies
 the issue indebtedness arising out of it - Not guilty was
 formerly held to be a proper gen^t issue to an action of
trespass on the case - now settled that it is not a
 proper gen^t issue yet if Def^t pleads not guilty & P^l joins
 instead of assessing & verdict is given the defect
 is cured. 1 Lev 142 Hca 1022 Exp 167 4 Ba 58.84 Ray 36

When to debt on bona Def^t pleads "nil debet" & not "non est factum"
 & P^l does not demur Def^t is let into any evidence that will
 show in point of fact there is no indebtedness - the plea
 admits the ex^{tr} & says nothing in avoidance so that
 P^l by joining in "nil debet" waives all advantages. 5 Exp 6
 38 1 Ch. 478 2 Johns 183. 8th 82.

In debt for rent "nothing in arrears" is a good gen^t issue as
 being tantamount to nil debet 1 Coups 588 1 Bouch. 19
 In Ct. the gen^t issue to Ejectment is "no wrong or dep^{re}is in"

Issues.

Pleas and Pleadings

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the genl. issue always containing the words "made at forma"
the genl. issue being a plea to the action goes in all cases to the
declaw & not to the writ - If therefore in law suit the writ
changes Def. as receives generally & the declaration as received
by the hands of C. - if Def. pleads the genl. issue he denies that
he was received only by the hand of C. - this being all that
is traversed 1 Inst 120 4 Bac 4-

Regularly the genl. issue like all other issues in fact conclude
to the country & is tried by a jury - but there are other modes
of trying such issues as by record - by certificate - by battle &c. - 3 B1 213, 30
4 Bac. 54 1 Inst 126

By the strict rules of C. L. the jury country no fact - they are
merely the means by which the Judges try the fact - they
conquer the same purpose as a record when the fact is to be
proved by record "multiplied record" being pleaded the jury are
the means by which the Judges ascertain the fact - This
distinction is material for in criminal cases it is settled
as a rule that a man shall not be tried twice for the
same offence - Suppose the jury did not agree in the
first instance or one of them have died during the trial
so that no verdict could be given - Can he be tried by a second
jury? He has been put in jeopardy & the rule is no man
shall be twice tried for the same offence - Answer - the jury
have not tried him - there is no trial till after verdict
& if the Court have never been satisfied of the fact by a jury
they have never tried him -
When "multiplied record" is pleaded P. concludes with a
unification - the fact is to be tried by the Court. Here the

Issues

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Verbs and Readings

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issue is not closed but the adverse party affirms over the
existence of such facts & praying an inspection of them closes
the issue - this shows the genl. issue is not always closed to the
jury Lewis, 146.8. 226 2 Leib. 113 2 P. 413 1 Bos. 141.

By our St. 267. the parties may always join issue to the Court
by agreement - before single ministers of the Law we have no
jury.

The form of tendering the issue in fact if the twosome is from
Def. is this "I of this he puts himself upon the country" - if from
Plf. thus - "I of this he says may be enquired of by the country" -
- reason of the distinction is that Plf. is not tried & therefore
has no cause for putting himself upon the country 3 B1 -

313 -

The former is proper where the terms are negative as in
case of genl. issues they always are - But where the twosome
is of a negative & in affirmative terms the latter is
proper - If Plf. issue is in negative terms & he concludes
it thus "I of this he puts himself upon the country"
a wrong conclusion is mere matter of form Lewis 147
3 B1 315 1 Inst. 126 - 10 Mod. 166

In Eng. the want of a similitudo is fatal & will support a
motion in arrest of judgment - In Ct. decided to be cured by
verdict. (2 Day 392) on the same principle on which it
has been decided to be fatal in Eng. - Doctrine explained in
the case in Ray) In Eng. the Juries evade their
own rule almost without saving appearances - in the case
in Carr 147.) et cetera being discovered below the signature
of the letter they hold it to be suff. - A similitudo is no part

Issues

Journal of the



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of the pleadings - it neither affirms or denies any matter of fact - it is merely a written memorial of the consent of the parties to try the fact in that particular way - by the form of the plea in Ct. it is expressly admitted & in Eng. I think suff^{ly} implied. 1 Saund 319 Stra 611 2 Burr 1793-

Enquire close the pleadings - & when well tendered must be accepted by the other party - If not well tendered it may be demurred to 3 B & 311, 1 Inst 126 Carth 86 1 Saund 338.

The words "mode & form" are sometimes of the substance of the issue & sometimes words of form - Rule - If the issue goes to the material allegations in the declaration they are words of form. Ex. In assault & battery D^{ft} is charged with having assaulted P^l with swords & knives - he pleads not guilty in manner & form - here they are matter of form - not necessary P^l should plead he was beaten with sword &c (Lewes 49 120 Stra 31). 2 Saund 319) But where the issue is taken on a collateral point arising out of the pleadings they are words of substance & transverse the form in which the fact is alleged - Ex. D^{ft} pleads a joignant by deed - P^l transverse the mode for a joignant without deed cannot support the action or be proven by a deed - Rule is arbitrary & no reason for it - yet I find no exception to it (1 Inst 281) The true rule seems to be that these words do not put in issue the circumstances alleged as true plea - unless they were originally material & necessary to be pleaded as in which case a transverse "mode &c" will reach them Lewes 120 -

Issues

Where payment of money is an antecedent precedent to the
 performance of a contract to convey lands a recovery of the
 contract cannot be given in evidence in support of
 a bill of exchange on the contract acquiring performance 2 March 1799
 4 Johns 392 9 do 115 3 do 528 15 do 304 4 Lewis 566
 3 Lewis 111 2 Mm 433. 455

S 345. n

Pleas and Pleadings

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An immaterial issue having no material allegation alleged on the other side is one taken on an immaterial point & which does not decide the merits of the cause. Any issue taken on matter immaterial & which is mere surplusage is bad & verdict does not cure it - a replender must be awarded tho verdict is found
4 Bosc. P. 103. Cr. & 227. Carth. 317. 2 Saund. 319. Gill P. 147. 3 B1
395- 1 Wils. 338 Kent. 193

An issue cannot properly be joined on a negative pregnant or affirmative pregnant - i.e. an affirmative allegation implying a negative - or negative one implying an affirmative - If Def^t pleads a release since the date of the writ & Pl^t traverses that he executed a release since the date of the writ it implies that he did execute it before the date of the writ - if Def^t does issue on this it would be a negative pregnant - such pleading is cured by verdict - By Hs. 32 H. 8 & 4 Ann. it seems to be ill only on special demurrer James 114 1 Ba 94 1 Inst. 126. 303 5 Ba 205 2 Saund 319. n. 6 Gill P. 14 Cr. 87. 312 -

But the proposition that such pleading is cured by verdict requires qualification - If the parties go to trial & verdict is found on the issue verdict is good & is found for party traversing in form of a negative pregnant - (James 114) Has used to matter of form by 4 Ann. - (1 Ba 88. 94 Lilley's Reg. 437. Gill P. 153 -) according to some opinions - not fully settled - An informal issue is one not taken rightly in point of form - not defective in substance & therefore cured by verdict - 2 Saund 319. n. 6 3 B1 395 - Carth. 371. 1 Ba 103 James. 32 Cr. & 227.

Under the Good issue Def^t may contest

Issues

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Pleas and Pleadings

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any part of P^{ff} declarⁿ for it covers the whole - in some cases it is the proper plea on special contracts when the facts are not intended to be decided - as in an action on a contract absolutely void thro obligor's incapacity - Ex Bond executed by feme covert - the wife her husband may plead the genl issue & support it by the countess tho no fact alleged in the declarⁿ is denied in evidence - the plea is non est factum - the defence admits the exⁿ & avoids the debt - this is the proper mode of taking advantage of the countess - the law voids the exⁿ by her as nullity both in legal effect & point of fact
 C. 11019. 107. 1082 29. 10. 145 - 6 Mod 311. 12609.

If the deed on which action is brought is void in its own nature & not from the incapacity of Obligor the genl issue is not the proper plea - Ex Action on expressions bond - the law creates no legal liability but as obligor was under no incapacity it is still considered as his act & deed he cannot therefore at C. L. plead non est factum & give the issue in evidence - but must plead it specifically - So where the deed is merely voidable - rule at C. L. the same (2 Bl. 292. Ex 223)

So if the bond &c. is void or voidable by reason of any incapacity in obligor not absolute - genl issue is not the proper plea - Ex Action on bond - incapacity cannot be given in evidence unless non est factum - must be specifically pleaded - for tho no legal debt arises from the bond & yet it is considered as his act & deed in point of fact - 2 Bl 292. 5 Co 119 16 and 166 3 Burr 1805 - 10 ER 15 - Ex 223. Stra 498 10673 - 10672. 116 - Rule of C. L. - that to a specifically made void by the non est factum is not the proper plea - the special matter must be pleaded

Issues

I cannot be given in evidence under the genl. issue Nov 72
M.R. 1108. 5 Co 119. E/p 223.

The facts of seizure - attestation - loss of seal & want of delivery
of a deed may all be taken advantage of under "non est factum"
- for they go to show that it is not his deed - One instrument
not delivered is no deed - there must be a legal delivery -
Non est factum is the proper plea if the seizure & destruction
destroy the effect of the deed - unless it is in a memorandum
on the deed at the time of seizure - 11 Co 27. 5 Co 119. E/p 223. 4 -
In genl. matter of fact & not matter of law is in question
under the genl. issue - this is a C.L. rule - case of a bond by a
feme covert (rule 392) is an exception for she gives coverture
which is now matter in evidence - whatever is introduced
not for the purpose of avoidance - denial but for matter of
evidence is called matter of law - Next under this plea
depends merely upon challenging what is alleged by Pff -
- some other exceptions introduced by H. E/p 224 -

Genl. Rule of C.L. that if the defense offered in evidence is
consistent with the plea it is admissible - otherwise not -
- If a feme covert is sued on her bond she may give
her coverture in evidence under non est factum
for the bond is a nullity in point of fact. Decis. of
inferior courts - her own testimony admit the exm but
avoid it by matter subsequent -

Genl. rule in Eng. that in Indebitatus (assumpsit) any matter
of defense which shows that Pff at the time of plea pleaded
had no cause of action may be given in evidence under the
genl. issue as relevant tho' tho' it would seem does not go to

Issues

12 Alloc. 108.

577

2 Lev. 1144

2 Exh. 6 481..

2 Schum. 279

5 Schum. 160

Schum. 134

135. 138.

Al. 47. 80

deny the promise but only to avoid the duty - the rule is founded upon the peculiar constitution of the action. In Ind. Ass't the promise laid is not supposed to have been an actual one but merely a legal consequence of the duty stated & whatever disproves or extinguishes the duty extinguishes the promise. Thus under non est factum affirmavit Post. may give in evidence duty - this would seem at first presupposes a promise tho avoidable. so of infancy release &c. for there being no actual promise the extinguishment of the debt by the release &c. extinguishes any implied promise. 1198. 3 Burr. 1553-1510. 1 Ray 787. Doug 108 2 H Bl 1113-

Sumner & holes in practice in special Ass't where there is no actual promise laid - here the evidence admitted is inconsistent with the plea for which reason I have always doubted the original propriety of the rule as applied to express ass't & Chitty considers it as a deviation from the G. L. rules - Bulle 502 1 Lev. 142 - contra Ch. B 107. 8 4 Babo. 1 5 Mod 18 -

But by H 21. Ind. - tender - set off - Bankruptcy - error & satisfaction - must be specially pleaded (Ch. B 198 1 Secund 283. 2 R. 556. 3 Ba 518 Esp 117. 2 Secund 120) & this rule applies to both species of ass't

In D R. 153. 556 the rule is denied as to error & satisfaction - but it seems well settled that the reason why a special plea is required is because it is matter of law which goes in discharge of the debt & not in denial - It is true that either of these defenses are

Issues

In debt on a specialty where the deed is merely indentured nil
debet may be pleaded. But where it is the foundation of the action
nil debet is not a good plea. 8 Johns. Rep. 32. 11 Mo. 476. 11 Id. 476.
476 477 2 Saund. 287 or 1-2.

Verbs and Pleadings

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matter of law & it is equally true that payment which is alleged to be given in evidence under the genl. issue & matter of law surely avoid inspection thereof & set off are no more special defenses than payment be. I think the reason of the diversity between them to be this - the rule was adopted only with relation to Ind. Aft. which on principle would have been correct but for want of proper discrimination between the two actions it has been indiscriminately applied to both. 1 Saund 282 D R 153, 566. Ch. R. 198. Sid 375

In debt on simple contract the pleading "nil debet" which is in the present tense all matters of defense which show that Debt. is not now indebted may be given in evidence - Secus under non est factum - for it would be inconsistent - D R. 566, Sid. 278. 1 Saund 283 2 Lev. 215 - 5 Mod. 8

Debt. in an action of Aft. may take the advantage of it of frauds - by relying upon it under the genl. issue to prevent Aft. from proving a promise required to be in writing by oral testimony & when offered may object to its admissibility. 1 Lev. 211 - Bulb. 92 -

This looseness of pleading permitted in Aft. is not in Eng. allowed in any other case - in tort or contract - if then Debt. in action of tort wants to avail himself of a release or of any matter of justification his defense is inconsistent with the genl. issue & must be specifically pleaded - for every justification of a tort presupposes a commission - 4 B & 60. 406. 174 - Bull. 18 Coup 1478 - 13 Int 282 5 Mod 232 -

Issues

Can a surety plead charge of his principal? 5 Hill
255¹³⁴ 15 Linn. 258 Ba. &amp; H.C.

Verdict and Pleadings

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Rule - Every defense which by the rules of law cannot be specially pleaded - (because they amount to the genl. issue) may be given in evidence under the genl. issue - Lewis 111

The 11th limitation in an action of Book debt as well as in lpt may be taken advantage of under the genl. issue. - (2 Lew 2 Swift 215 -) Lewis in action on bond - 2 Ba 519. In Book debt release may be given in evidence under the genl. issue by which Def^t is acquitted of the cause of action once existing (2 Qy 272 - DR - 566) Genl. rule - Def^t may give in evidence any thing which goes to show that Pl^t never had cause of action - In Eng. 11th limitation cannot be given in evidence under the genl. issue - Lewis in action running in tort - Lewis in lt - 3 Ba 518 - 4 Ba 66.

Def^t instead of pleading the genl. issue may deny any single traversable fact or allegation which goes to the gist of the action & conclude to the contrary - this is not the usual tho many times a convenient practice as it relieves Pl^t from proving the whole declaration. 1 Str - 282 - Com. Pl. Es. 11 Ba 60 - Lewis 112, 71, 35

The issue thus formed is called a special issue - If a plea tendering issue in this manner is made an answer to part of the declaration only the residue must be answered in some other manner - But where such traverse denies the cause of action or that which remains is not suff^t to maintain the action there is no need of pleading to part only for it goes to the whole

Issues

That a special plea amounts to the genl. issue if it is
 not a ground of demurrer, tho the Court may
 disallow such plea & cause the genl. issue to be
 entered 2 Day 336. 7. 1 Leon. 178. Bred. Pl. 2. 14. but 303
 L. 398.

What is matter of law. Lillies 410.

Ch. 4978.
 Diaa 600
 Co. 4. 262. 539
 8 Co 90.
 Demb. contra
 1 Leon. 178

Pleas and Pleadings

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- However when Def^t does, plead to point only he should answer the other in some other way - Such special traverses, will in most cases have the same effect as the gen^l issue, except Def^t will not be required to leave the allegations not denied - They deny the whole cause of action & not all the allegations -

A special traverse amounting to the gen^l issue is inadmissible - for it lengthens the record & tends to refer questions of fact to the Court - As if to an action of trespass Def^t pleads an alibi his plea is bad for it amounts to the gen^l issue & yet furnishes new matter - but nothing but new matter should be pleaded specially & the Court will judge of its legal sufficiency - It is impossible they should determine the legal sufficiency of an alibi - the question of legal sufficiency can only arise where new matter of evidence is alleged (106 127. Cr. 268. 329. 1 Vent 249 3 Bl 309. 3 Lev. 40) So at C. L. in trespass, quare clausum fregit a special plea of title is bad for it amounts to the gen^l issue (3 Bl 309) Secus in Ct of H.
Exceptions to the rule - 1. A special plea amounting to the gen^l issue is good if it contains special matter of justification - for it then presents a question of law which must be put on the record, - 2. The Court may in its discretion allow such plea when the matter pleaded is such as may breed a scruple in the minds of the lay gen^l -
- 3. - In a plea of title in trespass where the gen^l issue is so pleaded by giving colour as to raise a question of law 3 Lev. 40. 5 Ba. 202. Cr. 268 106 129. 209. Cr. 287. 2. tit. 166.

Issues

Every express colour ought to have 4 qualities. / 1st 2502.3 / It ought
to be matter, without fault, the being. - Colour as such ought to have
continuance tho it want effect. - It ought to be such colour
as if it were of effect would maintain the action. - Colour
ought to be given by the first conveyance. Thus all the
conveyance before is waived. / As to colour in genl. see 10 Co 116
Dart. Hart tit. Colour 72. & Bac. Pl. I. S. C. and D. Pl. 3 ed. 210. 211.

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2. Mod 274 1 Sanna 298 Sect 78 Cond. P. T. 27. 1 Inst 283
11 Bar. 62. 3. Sanna 51. 126 10 Co 88

Pleading specially, whenever is not warranted by either of these exceptions in case to be good cause of ^{Special} ~~demurrer~~
And yet it is admitted that the Court may in its discretion allow such pleading (10 Co 95. 5 Bar 202 - Bro 112 - Jenk 306. Co 877) According to others it is no cause of demurrer but of motion to the Court that Deft should plead the genl issue or that Pff should enter "nihil dicit" (5 Bar 201. Hob 127. 1 Inst 303 - 2 Almo 274 3^d 18 2 Ray 431. Bro 165) which I think to be the true rule generally - the both are correct & if properly applied are both law - Such pleading is not originally a cause of demurrer but of motion to the Court - If the Court disallow the plea & Deft refuses to plead the genl issue & join in demurres judgt will go against him - On Deft's refusing to comply with the orders of the Court Pff must have some way of obtaining judgt against Deft. & may do it in either of the ways pointed out by the rule - With this explanation the rules are consistent with each other (5 Bar 202. Co 165 11 Bar 134 10 Co 94 Jenk 306 Hob 127.) After the Court have disallowed the plea (or motion) Pff may take judgt nihil dicit. 5 Bar 202 - 4th 11. Co 165 - 219 -
Also a special plea which amounts to the genl issue is regularly inadmissible yet a special plea alleging fact which in evidence would support the genl issue

Issues

An argumentative plea amounting to the genl. issue
is back in denumer. 1 lb 498 in 1st 6 lb 597.

A. 1 lb 500 lb 2 lb 1 lb 244 / Coste this pen rice 1 lb 299 c
3 lb 273 / But if colour is given it is no cause of denumer
1 lb 500 1 lb 219.

does not regularly amount to the genl issue - as in an action of debt or simple contract release is a good plea yet it might have been given in evidence under the genl issue - so to the plea of infancy - D R 889. Id 394 5. Mod 18. Ch B 197. Carth 356. Lemens 44. Enter special pleas, of this sort the rule is - that no special plea that admits there was or more cause of action or that the allegations in the declaration are true amounts to the genl issue - this distinguishes the two rules - apply this to the example of a release which may be pleaded to an action of debt or simple contract - tho it may be given in evidence - yet if pleaded the plea does not amount to the genl issue - for it admits a cause of action once existed but avoids it by alleging new new matter - as of all matters which go in avoidance D R 566 4 B 62. 130. Ch B 197. Carth 388. Id 394. D R 88. 787. In all the latter cases, the defense is matter of law - i.e. new matter the legal sufficiency of which may come in question - D R 88.

- A. Special Pleas amounting to the genl issue are allowed in actions of assize & trespass by giving colour to Pff - but in no other case - 4 B 102 - Lemens 51. 126. 150 - 78 R. 354. 8. 403 -

Giving colour is alleging some feigned matter in Pff's favor in order to justify an answer by pleading a title of his own which he says is better - what he alleges in Pff's favor always consists of some defective title under which he says Pff claims - whereas if he had only

Issues

Issent

Verdicts and Pleadings

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1931

pleaded title in himself this must have amounted to the genl issue & have presented a question of fact to the Court - 3 B. 309. Lams 31. 126 10 Co 90. 5 B. 208

But Pff. in replying to Df's plea of title need not give colour & I suppose cannot - the necessity of Df's giving colour depends on the rule that a special plea amounting to the genl issue is bad - said in Wheat 282 that Pff. may give colour if he please, for it can do neither good or hurt - but Lams, 188 suggests a doubt whether it would not be all on special demurrer -

There is another plea which is neither the genl issue in common form or a special plea amounting to the genl issue - this is a plea stating special facts which go to prove the genl issue & conclude with the genl issue - for which there can be it is neither of the other two nor a special plea alleging new matter in evidence for it does not conclude with a requisition but to the country - Thus in an action on a bond Df may plead that he delivered the instrument to Pff - a series to be performed on certain condition which Pff has not performed & so it is not his act & ~~not~~ deed & in necessity of pleading in this manner for Df might have taken his advantage of the nonperformance under the genl issue (Gill L. C. 164 - See 274 Wheat - p. 216 Pland. 66) This is called pleading the genl issue with an assent & it ought to conclude to the country it being a species of genl issue & so say most of the books - yet according

1808
Issues.

1
In an action on a bond conditioned to pay a certain
rent specified in a certain indenture debt is assigned
to prove that the rent specified in the indenture
is less than agreed to be in the bond 28 C.L. 314

Plea and Pleadings -

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to come it may conclude with a recognition - sed quia
for it must then be a special plea in law - 3 H&B. 26
H&B. 66 Kent 9. 210 4 B&A 62. 89. Esp. 222. Contra Sal. 274
Gill. L. E. 164-5 Moor 30 Inst 112 Ray 512 -

This plea is useful in giving notice of the true
defence & confining the Jury to the particular
facts stated in it - for after this plea made Def^t
is not allowed to show the instrument not to be his
out & deed in any other than the way stated - Gill.
L. E. - 101. contra Sal 274. 5

Said that this plea may be commence (Gill L. E. 104. 164. 5) & so
I suppose it may if it conclude with a recognition. Sums
if the country - unless the facts stated do not support
the genl. issue - 5 Formerly whenever a deed ~~existed~~
executed in point of fact was originally void by something
extraneous - or became so by something extrinsic
Def^t could plead no other but this plea - Sums void
5 C. 119. Gill. L. E. 163. 11 -

This mode of pleading throws the onus probandi on
an Def^t. 2 for this reason D Holt has called it imper-
tinent - sed quia - tho it may not always be the most
useful plea (H&B 255 -) The only advantage of
this plea to Def^t is that he can state a question
of law on the record which must otherwise be
united with a question of fact - It is in genl. more
useful to P^l than to Def^t for special facts are
relied on in the defence & the evidence is confined
to those facts - Gill L. E. 163 -

Special pleas in bar.

A special plea has found for Def. does not admit the damages claimed there are to be ascertained by proof 4 Monel 312.

A plea in a former suit for the same cause of action is a bar to a subseq^t one altho rescinded on several grounds of Monel 287 the first remaining a bar 2974

Pleas and Pleadings

402.

Special Pleas in bar

A special plea in bar is usually confined to be one which admits the facts stated but avoids them by stating new matter
4 Ba 2. Lawes 37. 115. 129. Hol 104. 2 Vent 79. Cy 66.

This is generally the not universal rule - for a plea in bar may traverse some part of the declaration - In this case
Def. pleads a release he must traverse subsequent to the release. Hol 104. 2 Vent 99 Cro & 30. 118 Lawes 116 - 118
125. 148. 4 Ba 70 95 Lute 38

This plea admits all traversable matter it does not deny & goes in avoidance of that which it admits. 4 Ba 73
Sed. 91

Rule - Every special plea of justification must confess the fact intended to be justified for it would be inimprovement to justify that which is not confessed = thus in trespass for battery Def. instead of denying or confessing & avoiding it justifies an act which does not amount to a battery his plea will be ill on special demurrer. 1 Saund 11. 28
3 B. R 298. Sed 394. Carth 380 Lp 318

There is a species of special pleading or rather a defence pleaded in form of a plea in bar which does not admit the facts but goes to the gist of the action - i.e. an estoppel - this is some matter of record or some writing under seal which prevents the party from pleading a particular fact
It precludes P. from avering facts stated in the declaration
It does not admit avoid or deny any fact but shows that P. is precluded from avering any fact

Special Pleas in bar

2163.164

The Court will not allow inconsistent pleas to be
pleaded together unless when application is made to
plead them affidavit is made that they are
necessary for the justice of the case 22 C L 425 111. 538
436

A party may plead evidence but it must be such that
issue may be taken on it 5 Will 255 and 17 Mace 564

Pleas and Pleadings

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alleged by him - It is a plea in genere - It is a plea in law but does not admit any fact stated. Lewes 38:140, 136, 158 161, 170 Wills 13 3 Bl 308 3 East 346. 365

A special plea in law always avows new special matter & is usually in the affirmative tho not always - as in case of negative covenants - when Def. pleads he has not done the act covenanted against. 3 Bl 309.

The terms "new & special" matter do not imply that the matter should be positive or affirmative - every thing pleaded except the denial of the allegations on the other side is called new matter in law as contradistinguished from matter of denial - Every special plea in law must also conclude with a verification for whenever new matter is alleged by one party the other must have an opportunity of answering it as he pleases in further of three ways - by denying - by confessing & avowing - or by demurring 13 Ann & 103 3 Bl 309 Coop 575 Burr 772 - 1725 Lewes 150. 2 & 12. 103 Coop 58.

The 11.5 Geo 2. has introduced an exception in case of benefit of clergy which allows a special plea to conclude to the country - this is an anomaly - tho with the construction given to no inconv-
enience can arise from it. Lewes 115, 115 2267.

Pleas in the negative need not be verified - a negative need not be proved - therefore Def. may plead without a verification. Lewes 115 Wills 5

Pleas which form a complete & proper issue must conclude to the country - for if one party conclude such plea with a verification the other ought to affirm over his part & thus they would not necessarily be brought to an issue - when an issue is formed

Special pleas in bar.

A plea of puis darrein continuance which opens new ground of defence is a waiver of the former pleas put in 2 Mand 301 i.e. if it deny the off. right of recovery
10 Mand 679 6 Ba 479. 60 E 49 1 Ld R. 678 1 Sat. 178

In some cases in tort where a plea sets up matter in defence merely off may reply that a plea in bar does not constitute the cause by him alleged committed the injury & is presumed of in the closer & then put in issue every material allegation in the plea but this manner of replying is confined to cases of tort & where the defence is by way of excuse merely & is not allowed where a plea by this plea invites a plea on full & adequate right to Mand 133. & Price R 670
10 Ba 76 5 Ld R. 112 12 Ld 1491

Pleas and Pleadings

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which is ripe for conclusion it must conclude to the country. Ray 98. Coath 58. 3 Bl 309. Lewis 145. 5 Com 86. When Def. alleges distinct matters to diff. parts of the declaration he may conclude each with a verification or the whole of with one verification. 1 Sess 338. Sol 212-298. Coath 45. All pleas admit of course what they do not deny - hence "nil debet" is no plea to debt on bond for by not destroying it the ex. of it is admitted. 4 B & B. 1 Sess 39. 3 Lev 170.

L. R. 1500. Stra 178. 80 B un 2506. Hurd. 33. 332.

Black has laid it down as a genl rule that Def. must plead such a plea as is pertinent & proper according to the quality of his case state & instrument - this quality rule is undoubtedly true but there is nothing dis-
minuating in it to be of use to the student. 1 Inst 285. 4 B & B. 83.

Every plea in law must untain if uable matter otherwise it is not good - for if there is nothing if uable it cannot be tried - as in a plea to an action on a covenant that he the Def. has always been ready to pay without alleging tender would be ill for the relict intention of the party would not be tried & even if the issue were closed it would be impertinent & immaterial. 2 Wils 74. Lewis 137. 8.

Every plea in which matter of fact & law are so blended that they cannot be separated is ill - When matter of fact & law are involved they should be so pleaded as to admit of a demonstr to the matter of law & of a traverse to the matter of fact - thus plea by Def. that he lawfully

Special pleas in bar.

A. If to such Plea Aff. demand is placed over the whole action 16h 50g 510
 (4) is discontinued 16h 50g. 13aund 28u 1.2.3. Willcs 480 Int. 303a.
 176. 181 645 183a 411. the Aff at any time during the 2. 180b. 427
 some term may rectify the mistake by taking 38a. 474
 judgment. 16h 50g in the 303 240b Schob 27
 A plea bar in fact is bar for the whole 14 John R.
 249 13aund 337 u 3 38a. 376 Ch.P 525-

(4) within 20 John 204 Aff may demand 3 John C 205
 2 Mond 421 11 Pch - 70 12 62 36

B. bar in fact in the inferior courts this 16h 512 that it
 does not apply

2. 386
 16h 512
 13aund 304a

16h 50a
 13aund 28u 276
 Willcs 55

Plea and Pleading

No 38. 407

enjoys the goods of felons within such a place & averring that the goods in question were of that description the plea would be bad - for the Jury cannot decide the question of law whether he lawfully enjoyed them or not & yet the time are so blended as not to be separated - neither can the Court decide the question of fact whether did enjoy them or not - The plea should show the special matter by which the right accrued as by letters patent &c & then aver that under this right he enjoyed so that by traverse or demurrer the questions of law or fact may be referred to the proper forum. 9 Co 25 - Lawes 138.

A A plea in bar to the whole action ⁱⁿ must answer the whole grievance or cause of action or it is ill - for it is a plea in bar to part only - as in an action of assault battery & mayhem - Deft. justifies the assault only - plea is ill & if overruled on demurrer Deft. shall answer damages for the whole - Cro E 268 3 Lev 375. 1 Saund 28 1 Mol 373 Lawes 135 Com P. N. 21^{3b} 2 Saund 50. 127. 210. 1 Bac 56 1 Lev 16. 48 Esp 318 D R 229

Same rule as to all subsequent pleadings - if Plf undertakes to answer the whole plea in bar but in fact answers or part only his prohibition is ill in toto - 1 D R 40. 1 Saund 28. 337. 2^o 127. Lawes 101. 3 1 B R 636. 40 -

B Deft. may make diff. pleas to diff. parts of the declaration where it is in one or two counts - as to part payment - to the residue a release - 4 (Lawes 101. 3) Bac. N. 16.

If matter pleaded as an answer to the whole declaration is in fact an answer to part only it is bad in toto - so if that which would be a sufficient answer to the whole is pleaded to part only -

Special in pleas in bar

b5 Schms b2
11 do - 19

18h 509.
2 405. m

No matter of defense arising after suit but cannot be pleaded in bar of the action generally. yet it may be pleaded in bar of the further maintenance of the suit 20 Schms 414 4 Eo. 18

502

A plea consolidating two counts & answering them as one is bad b5 Schms 631 on special demurrer
26h R 291 - bad on good demurrer 5th. 11 178 23 Howd 487

Ex. "The causes of action set forth in each & all of the
counts is one & the same" 19 Howd 226. 2 Phil 174, 184

Pleas and Pleadings

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- If the plea begins as an answer to the whole & in law is an answer to part only P^{ff}. should take advantage by demanding - But if it begins as an answer to part & in law is an answer to part only it is a discontinuance & P^{ff} must not demand lest he discontinue his action but must take judgment by "nil. dicit" - See 179 D R 331. 481. 3 Lev. 135-6. 1 Scaud 28 Sta 302. 4 C. 62 2 Bos. 427. Cr 268 330 434 Cr 27. Selw. 4 P 411

Rule the same (Semb.) tho the matter pleaded would be a good answer to the whole - for this is the only consistent way of construing it - there are two cases from which it would seem P^{ff} might demand but this point was not in question. 4 C. 62 Sta 303 1 Scaud 28 When a plea begins as an answer to part only & expressly answers the whole P^{ff} may demand specially for its inconsistency - this differs from the case where it would be a good answer to the whole but is not expressly made so - as to an action on several promises P^{ff} pleads as to all but one. that he has paid the amount in the first third second promises - plea is demurrable - for tho it begins as an answer to two only it actually answers the whole. 2 Bos. 427. Lawes 136 -

Every plea which answers the gist of the action covers in law all matters of aggravation & inducement - as in trespass for breaking & entering P^{ff} have & expelling him therefrom - a plea which answers the breaking & entering is sufft without avowing the expulsion - for that is mere matter of aggravation - P^{ff} may indeed make a new assignment & then waive it &

Novel Assignment

Where *det.* has committed several trespasses either upon the
person, person, or real prop^y of another some of which are justifiable
& some are not the action being but for those not justifiable & *det.*
by his plea answers those only which were of *det.* should have answer
Ch. 604 Statute 299 a. 1. 2. & 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 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2010. 2011. 2012. 2013. 2014. 2015. 2016. 2017. 2018. 2019. 2020. 2021. 2022. 2023. 2024. 2025. 2026. 2027. 2028. 2029. 2030. 2031. 2032. 2033. 2034. 2035. 2036. 2037. 2038. 2039. 2040. 2041. 2042. 2043. 2044. 2045. 2046. 2047. 2048. 2049. 2050. 2051. 2052. 2053. 2054. 2055. 2056. 2057. 2058. 2059. 2060. 2061. 2062. 2063. 2064. 2065. 2066. 2067. 2068. 2069. 2070. 2071. 2072. 2073. 2074. 2075. 2076. 2077. 2078. 2079. 2080. 2081. 2082. 2083. 2084. 2085. 2086. 2087. 2088. 2089. 2090. 2091. 2092. 2093. 2094. 2095. 2096. 2097. 2098. 2099. 2100. 2101. 2102. 2103. 2104. 2105. 2106. 2107. 2108. 2109. 2110. 2111. 2112. 2113. 2114. 2115. 2116. 2117. 2118. 2119. 2120. 2121. 2122. 2123. 2124. 2125. 2126. 2127. 2128. 2129. 2130. 2131. 2132. 2133. 2134. 2135. 2136. 2137. 2138. 2139. 2140. 2141. 2142. 2143. 2144. 2145. 2146. 2147. 2148. 2149. 2150. 2151. 2152. 2153. 2154. 2155. 2156. 2157. 2158. 2159. 2160. 2161. 2162. 2163. 2164. 2165. 2166. 2167. 2168. 2169. 2170. 2171. 2172. 2173. 2174. 2175. 2176. 2177. 2178. 2179. 2180. 2181. 2182. 2183. 2184. 2185. 2186. 2187. 2188. 2189. 2190. 2191. 2192. 2193. 2194. 2195. 2196. 2197. 2198. 2199. 2200. 2201. 2202. 2203. 2204. 2205. 2206. 2207. 2208. 2209. 2210. 2211. 2212. 2213. 2214. 2215. 2216. 2217. 2218. 2219. 222

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substantial ground of action 3 BR 292. PR 136 4 B. 1. 555-2 Wils. -
20. 3 B. 1. 301. 5 Bar 113. Lawes 76. 103 240. vid. 4 Co 62.

Novel assignment is a particular statement of those in the replication which is stated more generally in the ~~declaration~~ ^{declaration} (Lawes 70 163 240 3 B. 1. 315-) & P^t may plead to it as to the ~~declaration~~ as it always concludes with a verification -

This novel assignment is not good unless it contains distinct substantive matter constituting a cause of action which has not been answered - 1 Saunders 299. Lawes 164 - 3 East 294)

The effect of it is to transform the gist of the action that which on the face of the ~~declaration~~ appears to be matter of aggravation - the allegation that the matter set forth in the new assignment is diff^r from those answered in the plea cannot be traversed - for if they are the same P^t may take advantage of it under the gen^l issue since in that case they stand justified on the record & the new assignment cannot be supported 1 Saunders 299. Lawes 241.

It is usually necessary for P^t to set forth specially all the particulars however numerous of a defence consisting of special matter of avoidance (1 Inst 133. 302 4 B. 1. 90 Br 2749 916 13 R 750) But now to avoid prolixity gen^l pleading is allowed - P^t need allege no more in his plea than prima facie amounts to a suff^r answer - need not negate every possible answer P^t may give. 2 R 400 Wils. 100 1 Saunders 298 4 B. 1. 91. Br 2749 916 13 R 215

Repugnancy in a material point vitiates the plea

In an action on a Bill def^t pleads an alteration affecting
 the Bill. Off. now signs that the Bill sued on & the one
 mentioned in the Plea are diff^t. - def^t rejoins the same
 alteration in the bill mentioned in the new signment.
 Off. cannot in his Surjoinder take issue upon the
 identity of the bill mentioned in the rejoinder with
 that in the replication & debs.^{ts} & conclude to the
 contrary. if there was no such bill as that mentioned
 in the plea Off. should deny its existence if there
 was he should have newly signified & given def^t
 an opportunity of answering 28 C.L. 366

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- but repugnance, in an immaterial point is mere
surplusage. 60 S 203 2 East 333. 39 ComD 629 Lames, 788
1115. 56. 66.

When est justifies under a writ so he must set it forth specially.
When the time it issued & from whom 1 Saund 298 Inst 2
283 Sel. 107. Willoc, 167. 2 Saund 402 Willoc 378 ComD 17. vid
Hob 27. 295 - that matter of law must be specially shewn
to the Court -

Plea in bar regularly begins actionem non - that est
ought not to have his action - but they may commence
oversari non debet when the plea shews there never
was cause of action - the first denies the present
cause of action - the latter that there ever was cause
of action (Sel 515 - Lames 139) said that actionem non
goes in every case to the time of pleading - not to the
commencement of the suit (Camp 108. 12 - 2 H B 1143)
but this it seems is not true in all cases. Lames 128
3 H B 186 Camp 590

A traverse is the denial of some particular
fact alleged in the pleadings & always tendered in issue - It
may be taken to any part of the pleadings as well as to
the declaration. Litt. p. 282. 11 B a 67. Gelot. 105 -
When a traverse is preceded by special matter of inducement
Lames calls it a special traverse & when not preceded by
such matter of inducement it is called a general traverse
- a traverse preceded by an inducement is called a
technical traverse - I think he is mistaken as he had
not in contemplation one class - (Lames 116. 17) I think

Traverse

It is a good plea in bar to an action on a bond
that it was given to compound a felony. The plea
must allege either that it was given to compound
or in some way to induce a p^{ro}. then pending ag^t
the felon or the actual commission of a felony. It
need not show that Off knew the crime had been
committed. Suff^t to allege that he had notice & this is
a good defence tho the bond was given for a radical debt
if obtained under c^ort to compound. 2 Wils. 317 5 East 294
16 Comp 46 5 Will 252.

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the extent of a traverse decides its character whether
general or special - If it denies all that is alleged it is a general
traverse - if part only it is a special traverse Lanes 116.
to 121.

Said that a traverse does the issue - incorrect - A technical
traverse is always with an allegue hoc & regularly concludes
with a verification - It tender, an issue merely - If one
party pleads that S. S. from whom he claimed title died
reised in tail allegue hoc that he died reised in fee &
thus he is ready to verify - to close the issue the other party
must affirm over his allegations & conclude to the
country - 4 Be 67. 5 Co 24. Str 871 Burr 321 Lanes 121 -
1 Sourd 103. b. Doug 212 5 Co 109.

The words allegue hoc are technical words of denial &
are therefore in the last case equivalent to saying he
did not die reised in fee - these words are not indis-
pensable - the words et non are equivalent Lanes 119
1 Sourd. 22 -

A general traverse which includes the whole of the other
other party's allegations concludes in general to the
country - the formal traverse allegue hoc is a general
traverse - as in Cipault & Battey 6 Eft pleads non
cipault de me - It replies de injuria mea proprio de
includes the whole matter of defense & concludes to the
country. 1 Sourd 100 Sel 21 1 Bos 76 2 BR 433 8 Co 66. 2 N 6
364. Burr 317. Lanes 152. Doug 90 Cro E 117. 64 5 Co 109
98 -

In a special traverse it may be necessary for the other party

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to make a special answer - it may be taken to an immaterial point & furnish an answer for part only of the declaration & is avoidable - But a general traverse which denies the whole allegations on the other side this necessity can never happen - for it never can be immaterial - In many cases a general traverse may conclude with a verification or to the contrary - proceeds better ways - on principle it is proper to conclude to the contrary - for after a general traverse the cause is ready for trial - all the allegations are denied - how can any thing new be answered - or how can the opposite party demur without destroying his own plea - the conclusion clearly should be to the contrary, 2 BR 443 Bun 1022 Coines 121. 18 Ann 133 -

The general traverse de injuria is very appropriately adapted to answer matter of excuse & is in general a good answer to justification when it consists of mere matter of fact & not of matter of record right title or interest - If it consists of either of these it is improper - for it is inappropriate to trial or denial of such things, 15 Co 61. 3 Co 61. Com. Pl. 11 20. 1. Yet even in these cases P^l may reply de injuria & conclude with a special traverse of any particular fact in the opposite pleadings for the matter of law is divisible from the matter of fact - Suppose in an action of trespass C^o justifies & among other things pleads the record of a court - P^l's object is to deny the justification but he cannot conclude with the oblique traverse - for the record which is matter of law

Traverse

So it is justified by warrant of a Surrogate / Ch 581. 12. Nov 582. 583. / or
servant of another / See 8 Co 67 b. 67 a. Lute 1459 1 Bos 76 Miller 100. 101.
2 Sam 295. b. 1 / or if his plea shows an authority & derived from
H 8 Co 67 b 8 1 Bos 80 Com H 322 / the ~~Rea~~ & replication
should be special - see also further / Ch 580. 681 582

When the plea contains matter of excuse only the repli-
cation of an injunction is good but where it contains
matter of justification that replication is bad (Macle
120 4 Bos 157. 5 do 112 13 do 441 7 Green 46
8 Macul 132 1 Bos. 76.

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might be put to the jury - he may plead de injuria & take
a special traverse of the record - the issue is then properly
taken - & this is the common reply to matter of
justification in torts - This genl. traverse de injuria
may be pleaded in its genl. form to a plea alleging
~~new~~ matter of record right title or interest - But
when such matters are alleged by way of inducement
they are not traversable & agent does not

make it a parcel of the record. Comd P. R. 2 Lemes 156
86057. Run 320 -

A technical traverse is citius preceded by in matter of
inducement & begins with an allegation - differs from
a denial by common negative not only in citation but
also in conclusion - it regularly concludes with a
verification - a common positive denial to the
county (Lemes 117 145.9) A positive denial by common
negative is the proper one where the party tendering
the issue introduces no new matter & the common
language of denial is suff. - Ex. To plea of usury R.
may reply by technical traverse that the action was
upon a good consideration & allege that it was
conspicuously agreed &c - or he may say it was not unlawfully
agreed & conclude to the county which is a direct &
positive denial by common negative 2 Lemes 206
R 103 Run 1022 R R 98 Lemes 871. Lemes 116 18.49 23 R 239
23 R 6777. Run 324. Lemes 117. 45.9 23 R 364
Now settled since H 485 Run that a wrong conclusion is
matter of form & advantage & may be taken by

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special demurrer - I am before the Ct - then it is on genl demurrer
Samb 1 Baq 114 116 on 164 1 Kent 240 2 Saund 103
285. 2^d 190.

When an allegation on one side is directly denied by a
common negative on the other it is useless & improper
to superadd a technical traverse - for if that were
allowed the parties might answer over in infinitum
& would not be bound by the rules of pleading to come
to an issue. Ex. P^t avers performance of a condition
predecessor D^t says he has not performed - now the
superadding absque hoc would be improper for there
is a complete issue by the first words & it would be
demurrable. 2 Saund 117. 118 871 Cr 2 775 - 1 Kent 101.

Bay 38 2 Saund 188.

Where by common negative is more simple consistent
& less entangled than a technical traverse & brings on
a more speedy issue for it always concludes to the
country - In conclusion of pleas assessment is used
in the same sense as verification - or may be taken
for the allegation "I this he is ready to verify"

Where one party introduces new matter which is inconsistent
with the allegations of the other which are not traverseable
but which does not form a complete issue a traverse
of these allegations is necessary - If one of two D^{ts}
pleads that his co-D^t is dead - P^t replies he is alive
the replication introduces new matter inconsistent
with the plea but as both are affirmed they form
no issue - he should have added absque hoc that

Traverse

Mas and Readings

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the said I. S. was dead. (Hol. 113 1 Lev 82 Lames 117. 18 1 bils 253-
2 Lames 207. 9. 1 B. 8. 70 Lev 103 1 bils 213 3 B. 310-) This
rule however is not universal. Ante
When in answer to a negative allegation it is necessary
for the party to set forth some special affirmative
matter for the purpose of exhibiting his defense he must
not conclude with a traverse of the negative matter
alleged on the other side - this may be called a genl.
~~traverse~~ rule forming an exception to the former
genl. rules - In debt on an exhibition bond if Def^t
writes the condition & says there was no award Pl^t must
reply there was an award & set it forth specially & assign
a breach - but he cannot after pleading in this manner
traverse Pl^t allegations "that there was no award" tho
inconsistent with his own - for he must plead the
new matter specially to make out his own cause of
action for without setting it forth it does not appear
he has one & by leaving it forth he must leave it
open that Pl^t may answer it as he pleases - a traverse is then
unnecessary because the issue is ready for trial - another reason
is that an oblique hoc can only be taken to an affirmative
Hob 283 Lames 150 1 bils 189 Cornb 233 1 bils 356. 7.
said by some that a special traverse must have a proper
inducement or it will be a negative pregnant - This of all
is the most perplexing rule I ever met with (Hob 321. Cornb. P. C. 20
3 Mod 16 Lames 118.) But this is not an universal rule - that there
are cases in which it ~~is~~ is a negative pregnant - what
would be a negative pregnant is probably no inducement

Traverse.

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But its having an inducement or not cannot be made the
intention to determine whether it is a negative pregnant tho
an inducement might prevent what would otherwise be so
the question is not "shall I add an inducement to prevent a
negative pregnant because a license alone always makes
one?" but "will the issue without an inducement become a
negative pregnant?" } Ex. & Off. pleads an express agreement
to pay ten per cent. P. replies, "that there was no written
agreement to pay ten per cent" - this implies that there
was an agreement to pay nine or some other unlawful
interest - but by prefixing the proper inducement this
implication is excluded -

But there are
many cases where a license without an inducement
does not form a negative pregnant - as, where one pleads
his codeft is clear P. replies, he is not clear - this is no
negative pregnant - the rule as laid down by Lord & James
& which I consider that one is holds, in genl only, when
the license is taken by itself including circumstances
not particularly material - then it will always make
a negative pregnant - Ex. & Off. pleads a justification as a
license on a particular day - the implication is open
that he did the act on some other day - for the license
taken by itself extends to the time which is immaterial
- but this is easily avoided by an inducement that P.
committed the act of his own wrong allege has that
he had a license. 2 Decem 1888. P. 103. Willes 281 Q. 280, 312,
where the party merely confesses & denies a license is
unnecessary & improper - for since he confesses &

Traverse

A party is bound by a verdict in a case of a particular fact & is obliged to plead the contrary
29 C L 96. vide too 20 L 382 to. cont.

If a representative be made of any fact with a view to influence the conduct of another or with a view of advantage to the party & which cannot after be denied without a breach of good faith it operates as an estoppel
Ex. libelation with a woman as a wife 2 Ex 187 16 Com 245 4 Co 215. moor v. pearce 15 Mead 311 - an agreement not to take advantage of St den^a - 15 Mead 312. The whole name is St. says it is B. & in ignorance is created by the name of B. 3 Com 108. Plea of misnomer Off may reply a recognition of B'st enclosed into per lūm the lūe is no party to it 2 A R 453 & Stark 16 8 Mead 483 4 Co 653

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avoid which he alleges is consistent with the allegations of the party - then the other being a traverse would be inconsistent with his own new matter - Ex. Def. pleads a release - Pl. replies that the release was obtained by fraud - he ~~should~~ not be referred a traverse of the release for the replication per fraudem is not inconsistent with its existence - but the denial would be inconsistent with his plea (Ex. 1223 Ex. 1284 2 Alboe 165) In such cases where the party confesses & avoids he must conclude with a verification that the new matter may be answered on the other side (3 Bl 309. 1 W. 258 Lanes 118. 1 Lanes 207. 2-5-) but if the party conclude with a traverse it is all only on special demurrer 1 Sav 25. Coth 166. Ex 161-

A traverse based on by an inducement & which goes to the same point with the inducement is but a conclusion of fact from the inducement - Ex. Def. pleads S. & died seized in fee simple. Pl. replies that he died seized in fee tail etc. & que-
ries that he died seized in fee simple. - When a

technical traverse with a verification is tendered the issue is formed by the other party's affirming over his former allegations & concluding to the contrary. 1 Sal 4. 1 Inst 126 Lanes 119-

Rule in the books that an issue joined on an abrogue hoc ought to leave an affirmative answer - It means this - that a negative cannot be traversed with an abrogue hoc - for if that which is traversed is a negative the other party affirming over which is thus traversed it will still

Traverse

said that virtue signs is not traversable. Rule where
matter of Law only is comprised in a virtue sign it is not
traversable but where matter of fact is involved in it
it is traversable B & L 138 volume 23.

16h 597.

43h 439.

Traverse

10h 547

Sec. 22. n. 1.

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But a traverse after a traverse is good even tho the first traverse be material - By a traverse after a traverse is meant one which does not go to the same point or same specific ground of issue or defence with that of the former traverse - Ex. he trespasses. Def. pleads a licence on a particular day, altho he has that he was guilty before or after that day. Pl. will of course join in that traverse - But he may in this case leave the traverse & take issue upon the inducement i.e. traverse the licence - for if he were bound to take issue upon the traverse he would be entrapped - Here the inducement of the second traverse does not go to the same point with the first - The first traverse embraces the trespasses committed before & after the day on which the licence was given & not those committed on that day. Now Pl. right is material per otherwise Def. might plead a false justification as to a particular day & Pl. would be precluded from taking issue on the time when Def. was actually guilty & of course be innocently prosecuted - Hob 104 -

Regularly whenever a traverse is taken apt & material to Pl. title he is bound to receive it & cannot for the same thing leave it & force Def. to answer another traverse tendered by him - no case against this in the books. - Hob 104 2 East. 42 IR-14, 6 2 BR 3, 9.

If Def. pleads a joinder on the bill though he must traverse all the trespasses before the joinder - for a joinder will justify all acts committed since - & if the wrong was committed before the bill which Pl. would join in the traverse & thus if committed after & there was no joinder Pl.

Traverse

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must have a right to traverse the joinder - But if
Def^t plead a lience ~~off~~ must traverse all trespasses
both before & after the lience - & P^t must have an
opportunity to traverse this lience - Mol 104
When Def^t has a justification as to part he should plead
specifically as to the part only which is justified & the gen^l
issue to the remainder tho if he does not P^t should follow
him - Ex. Def^t must avail himself of a lience for one
day - it would be lost to plead that as a justification
for trespasses committed on that day & as to those
committed before & after that day, he should plead
the gen^l issue - If he does not P^t should understand
the rules laid down or he will be in danger of losing
his case -

Exceptions to the gen^l rule - 1. Where the first traverse
is taken on an immaterial point the other party
may treat it as a nullity & traverse the inducement
- This does not come within D Holt's description for
when he speaks of a traverse upon or across he
takes it for granted that the first is taken to a material
point - In this case however P^t is not bound to take
any traverse for he may demur - Mol 104 Yelot 157
Carth 116 4 M 440 1 H B 1 376. 406. 1 Saund 22 1 Loe
25. 1 Inst 282 4 B a 73 Co 24 Cr 3221

2^d When in an action of trespass in the County of S. Def^t
pleads a local justification in the County of N. altho
he that he committed any trespass in the County of S.
- P^t may leave the traverse & traverse the local justi =

Traverse.

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justification in the County of H. This is allowed to discharge
foreign pleas, which are false & which tend to oust the
Court of its jurisdiction - & if this were not the case P^{ff}
might file the justification be false. - Cr 299. 418
Cro 105 Cr 597. Pop 101. 4 M 139. 439. Cam D. Pl. G 18. 53 N
267. 1 H 131 1403 413 a 75 - 2 H 131 182.

When matter alleged in the declaration is in its nature civil
so that P^{ff} is entitled to recover for as much as he can
lose P^{ff} cannot make that part of his plea which
is an answer only to part of the issue of action in
inducement to a traverse to the residue. - As in Cr 100 P^{ff} may recover for any sum found - P^{ff} to this
pleads payment of £50. altho he that he owes any
more - his plea is bad - for if £50 only were owing to
P^{ff} he were bound to join in the traverse & offer in
evidence that P^{ff} did owe him more than £50 the
issue must be found against him - P^{ff} should plead to
all but £50. non asumpsit & to that payment
Yelds 125 - Corn G. Pl. G 20. 1 Second. 267. 9. Same 118 -
Suppose in an action of obstructing P^{ff} lights P^{ff} pleads
a justification as to time altho he has that he obstructed
three - Now if there were but two lights obstructed &
P^{ff} P^{ff} had no justification if P^{ff} join in the traverse he
cannot recover tho for part he had good cause of action
P^{ff} plea is bad - he should have pleaded not guilty as to one
& his justification to the residue.

The party to whom the traverse is tendered does not by
joining in it admit the new matter alleged in the

Protestation.

Where one pleads a plea & takes another matter by Protestation
the issue is found agt him the protestation is of no service but only prevents
a conclusion where the issue is found for him except it be a matter
which could not be pleaded. Ex. Jones dies his son who protests
that he is his slave & pleads other matter in bar - if issue is found
agt the receptor - the slave is free Smith L 359 Ross 276
1 Inst 124 Litt p 193 2 Saund 103 c 101

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inducement - for in genl a party is obliged to join in the traverse when well tendered & it would be hard to imply an admission from a joinder when he was compelled to join - *Sains, 118 Yelot 225 1 Saund 267. 4 Ba - 68.*

When the inducement & traverse are properly accepted to each other the joining in the traverse regularly implies a negative of the inducement - for the traverse is but a conclusion from the matter of inducement - hence a denial of the traverse must operate as a denial of the inducement - This is always the case where the traverse & inducement go to the same point. E. One leasee & S died seized in fee & the other that he died seized in tail abque hoc that he died seized in fee - if the first joins in this traverse it is no admission of the inducement - But even if the inducement is impertinent it is not admitted by a joinder in the traverse - The party tendering a traverse admits of none what he does not deny. 43 C 272. Sal. 91. 1 Wils, 338.

But either party may avoid such admission as far as they regard another suit by Protestation the object of which is to avoid the admission of such allegations as are not denied in the pleadings - It answers no purpose in the suit in which it is used for it cannot be put in issue - in strictness it is no part of the pleadings - 4 Ba 68. Com M. 4.

The precise effect of the protestation is to prevent the record from being given in evidence against the party protesting in any other case between the same parties.

Protestation

But where the matter protested agt^t cannot
be taken or issue taken thereon it shall be deemed to the party protes-
ting tho the issue be found agt. him. Ex. Hospers for breaking his
house & taking his goods of \$5. value. Def^t. may protest that they
were not of more than \$3.75 value - Find \$ 354 2 Lites. 1320
Row. 1. 2 Secund 103 C. 1.

2 Secund 103 C. 1

That which is the ground of the parties suit cannot be taken 2 Secund 103 B. 1
by protestation Row. 276 Doct. A 296 More 355 Bro 6 365 3 Lites Row 276
109, 116

A protest^{or} may be taken in a Repliation 5 Mo 136 2 Secund 103 B.

164 586

A protest^{or} repugnant to or inconsistent with the plea is bad
Plow. 276. 48 Bro 6 815 14 So an offer of judgment Def^t. takes
by protest^{or} that off had any debt or incurrence & pleads that he
was not incurre^d or lent 2 Secund 103 B. 1

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on the same facts - Hence called by D Cohe the exclusion
of a conclusion. 3 Bl. 311. 1 Inst. 126 Bun 1223 5 Com 126 5 Tho
136 Plowd 27b 2 Saut 103a n1

A protestation is the only way of denying these allegations
which cannot be put in issue - it requires no answer as it
cannot be put in issue - effect the judgment in the principal
case. James 141. Plowd 27b 5 Com 126 1 Inst 126 Litt p 192

For the same reason repugnancy in the protestation
does not vitiate the pleadings - But matter which
might be excluded by protestation will be conclusive
evidence against the party, unless protested against in a
future action where the same facts ^{between} ~~against~~ the same parties
are in issue over, whichever way the issue is found in the
principal case. Litt p. 192 James 141. Com 127.

A traverse can be taken only on issue of matter - matter
of law however material cannot be traversed. for the object
of a traverse is the denial of a question of fact - thus the words
I put ~~here~~ ⁱⁿ here limit the - in a plea of justification cannot be
traversed - for the question is material yet as it is matter of law
it is not the proper subject of an issue to the Sur J Plowd 205
2 KB 1. 152-77b 3 Wils 234 Cr 2 169. 205, 160 103 - 1 Saut 22.3.268
25.28 207. 13 B 94. 66 24 Center 21. Com 325. 1 Roll 235 - 1691
81. 1 Wils. 338 ^{and} upon the same principle a plea of virtute
argues in a plea of justification cannot be traversed - as in an
action of trespass for false imprisonment Def. pleads in
justification a writ directed to him or Sheriff per quod or
virtute argues he took he - Pff cannot traverse that he
acted by authority of the writ or that it was directed to him

Traverse.

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- for whether it was of sufficient notice or authenticity to warrant the arrest is matter of law & therefore not issuable (2 Met 509 11 Co 10. 1 Saund. 23. 125-298 & Ray 410 5 LR 66) tho the issuing the writ may be traversed.

Every traverse must be taken on a single point - i.e. it must not be double or multifarious - By a single point is meant a single ground of claim or defense - It need not be of a single fact - for one entire ground of claim or defense may & generally does consist of several facts - as in trespass for injury done to P's cattle - (P'st) pleads a right of common for his cattle herant & couchant - P'st replies that they were not his own commonable cattle herant & couchant - P'st demurs specially to replication as being multifarious - but court held it good for the herant & couchant of his own commonable cattle make up one right of common - Burr 320 13 Co 80. 8 Co 66 1 Wils 338 Bull 93 Doug 6210 15 LR 1101.

Where two points are material either of them may be traversed. By 366. Comd. Pl. G. 9. 10. Lawes 218 6 Co 24. 1 Wils 338

Nothing but what is alleged or necessarily implied in the pleadings of the opposite party can be traversed - this rule is founded on the first principles of pleading - for a traverse is a denial of the allegations on the other side & it would be futile to deny what is not alleged - as in an action on promise to pay the debt of another which should be in writing - the declaration is in common form & says nothing about a note in writing - In this

Traverse

Every matter of fact alleged by the Off. may be traversed by Def. & Def. by way of traverse may answer the matter alleged in the same words the Off. has alleged them / Quid. 195 2 Saund 208 n 21 Dey 315 / i.e. if Off's allegation be material - for Def. shall not be permitted by expressly traversing any allegation in the declaration by a formal traverse to compel Off to prove more than he would be bound to do if Def. had placed the genuine issue 1 Saund 267 D 209 a n 24 2 Burr 904 / where the fact traversed is not material - 246 B. 527 3 Tra 815 -

In action for damages where the Off is entitled to recover the his proof sheweth not sustain his whole demand a traverse which seeks to limit him to proof of his entire demand is bad - Ex Def. pleads that Off's account was for work at law in Equity - Replication that it was not for work at law and in Equity - Replication need be bad - 27 L 404 2 Saund 206 n

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one P^{off} may plead specially that there was no note or writing
so but should not traverse a fact which is not alleged in the
declaration - But 13y St Ann & Eliz such a traverse is
ill on special demurrer only 6 Jur 629. ComD. M. G. 13. 18 2 Vent 79.
Cauth 99. 2 R 64 238 1 Saund 312. 206. 2 10 4 Ba 75 2 Roll. R. 37.

P 225 2 Mobby. vid 2 Bun 994. L. 6 225. A any material point
of fact appearing in the pleadings tho in the form of a
suggestion & not of precise allegation may be regularly
traversed - i.e. - one denies of the cause of action. Com. M. G.
L. 2 169. 2 Saund 206. n. 21. Lums 118 -

When a party justifies or in any other way opposes & avoids
part only of what is alleged against him he traverses if he
relies on one must be co-extensive with the part not
justified or avoided 2 Alth 68 11 L. 1 415 1 Lev 241. 307. - Ante
Mob 104. - 1 Sed 295 1 Sal. 222 L. 2 87.

Exceptions - If the justification is laid on the same day in
which the trespass is alleged to have been committed it is
not necessary for P^{off} to traverse the commission for any
other time for here the time being the same the trespass
justified is identified with the trespass charged & P^{off} will
not be defeated by his mispleading the the trespass as
actually committed before or after the time justified
for in this case (13 R 636) he can involve a novel of fragments
of a trespass at another time & compel P^{off} to answer
to it - but as it stands on the record P^{off} has made a
complete defense 5 Ba 206 3 Sal. 32. Bulst. 138 2 Saund 228
566. 295 2 14 Bull 117 L. 2 165 514.5 May 86 3 R 1 311
4 Ba 125 -

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But traversing before & after the day on which the justification is held is not necessary if Deft. avers if the acts of which Pff complains are the same with those justified - & this has been the usual mode of pleading in our practice - Thus, if Pff pleads a release he avers that the trespass released is the same with that of which Pff complains. 12 Ann 11, 646-2-5 1711 181 636 11 E. 657. 5 Bar 207. Lamer 200. Cause 161 - Contra Vent 184 2 Kel 876 -

In many cases doubtless an inducement to traverse is not necessary - thus in those cases where a denial by common negative will answer as where the party has no occasion to introduce new matter - & in most cases where the traverse will not amount to a negative pregnant without inducement it is unnecessary - But in many cases a certain & direct denial by a common negative will not answer - then a technical traverse with an inducement must be used - it is many times necessary to prevent a negative pregnant & this is its principal & important use - 12 Ann 118. Com P. G. 20 (Mowell) & Action of Assault & Battery - Deft pleads molitur manus inposita &c. - this plea must be traversed by Pff but if he traverse it without any inducement it implies that there was no battery at all - but by aid of an inducement that Deft committed an outrageous battery Pff may traverse the facts alleged in the defense & yet reserve his course of action for the inference that there was no battery at all is excluded -

2. An inducement may answer a very important

Traverse

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Impose when used by way of protestations - true protestations are not common yet they are sometimes necessary -
3. When an inducement & traverse go to the same diff. points the inducement is indispensable - it is a necessary part of the defence - for the traverse in this case does not answer but repeat of the allegations on the other side - An inducement to a traverse must consist of issuable matter (2 Leon 32 - Co L 236 4 Ba 68) & nothing can be an inducement to a traverse but such thing as is traversable 4 Ba 68 2 Leon 32 -

This rule is the proper one & is founded on the substantial rules of pleading - for when the inducement & traverse go to the same issue of action or same point the traverse is but a conclusion from the inducement - if therefore the inducement does not consist of issuable matter the traverse will not - if they are properly adapted to each other both must necessarily consist of issuable matter - As if P^{ff} pleads I. S. is dead P^{ff} replies that he is alive & que hoc that he is dead - here the inducement "that he is alive" relates precisely to the same point that he is dead with the traverse "that he is dead" - But if the inducement had been in pointment as that I. S. was born ten years ago & que hoc that he is dead - the traverse does not follow from this inducement & is therefore bad - The rule then is founded on this - that the traverse is a conclusion of fact from the allegations in the inducement when both are to the same point - but if they are to diff. points the inducement

Traverse

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must be of issuable matter - for it then constitutes an
material part of the claim or defense - But this is a
formal defect merely -

A traverse generally averses the terms of the allegations
denied - tho this will not always answer - for many
times such traverse amounts to a negative pregnant
- Thus in an action against Coft for obstructing three
lights - Coft pleads a justification as to two oblique
how that he has obstructed three - but if he did not
he may consistently with his traverse have obstructed
one - & that will be suff. to support the averment. 1 Inst.
126. 303. 5 Bar 201. Com Pl. R 5 - Lomas 114 2 Sauton 119 R. 268
1 Root 88 4 Bar 98 2 Leon. 107. R 136 Stra 1193 5 Com 144

There is one way of traversing which requires a diff. made
from almost every other plea - this in an action to recover
money on an obligation payable on or before such a day
- If Coft pleads payment before that day, it is not suff.
for Pff to traverse payment modo et forma &c. or before
- he must traverse that Coft has paid either at
before or after the day of payment - before as well
as at the day, being a suff. performance of the condition
of the bond - & it is a rule that where a party pleads a
plea which shows his performance on his part the
other must show the contrary, in an absolute
manner - tho this is not necessary when he pleads
a collective matter as a release &c. (2 Burr 914
2 Wils. 150 Stra 994 11 Bar 66) But if the money was
to have been paid on a day certain Pff might have

Duplicity.

Pleas and Pleadings

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traversed the plea in modo et forma for that does not make the day a point of the issue - As to pleading in law where the obligation is made payable on a certain day, Def^t should not plead payment before that day - for payment before the day will not support the plea of payment on the day - such plea would be ill on special demurrer only - Bun 944 2 Will 150 Comd P. L. 237

Attorneys like any other ~~plea~~ issue in fact is followed by the words modo et forma - but they do not appear to be necessary & the want of them is no defect even in point of form Comd P. L. G. 1. Lamer 120. 21 Dec 68

Duplicity in Pleading

This is a fault because it tends unnecessarily to create prolixity & confusion & as the case may be to the satisfaction of the parties 3 M 311. Poud 196 1 Inst 304 1 Mod 294 1 Saund 337. D. 5. 101.

A double plea consists of several distinct & independent matters alleged to the same point - i.e. the same particular ground of claim or defence & requiring diff^t answers - the policy of the law will not permit a party to allege several grounds of claim or defence when one would answer 1 Inst 303 3 Sel 142 1 Cth 180, But giving diff^t answers to diff^t parts of the declaration or other pleadings does not constitute duplicity - Def^t may plead to meet the gen^l issue & to the rest special matter in avoidance

Duplicity

Where several facts constituting one point of claim or defense are pleaded the other party may not traverse each fact - he should deny one only - for a failure to traverse either fact thus set up is equivalent to an admission of the whole plea - a traverse denying all the facts thus pleaded is bad for duplicity. 10th and 35th

8th 130. and 3rd 111.

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- or he may traverse a point & clem to the residue -
but he cannot give diff answers, to the same point
without being guilty of duplicity (Lancaster 101, 1 Inst 304,
4 B & C 118. 129) so also at C. D. if there are several
Def^s each may plead some single matter to the whole
or diff parts of the allegations - for if it were otherwise
one might choose a defence of which the others might
not approve & thus open a door for fraud & collusion
between 2 one Def^s Ex 414. 19. 20. 114 70. 114 80
D R 1372. Lancaster 101. 4 B & C 118. 129 -

Held in 6 B. & C. 244 - that Def^s can sever their pleas
only, in actions on torts - for if one or more are sued on
a contract they are safe in joining in the gen^l issue
for if the contract is not proved against all there
can be no recovery against either - this decision I
think correct - When all the Def^s choose the
same plea they ought in those actions to be compelled
to join - but when they differ as to the propriety
of the plea on which they ought to rely in their
defence it would be unreasonable to compel them
to join.

Every plea must be entire - simple - connected &
confined to one point - but this point need not
consist of one single fact - Each party must be
at liberty to state all the facts which constitute
parts of his claim or defence - If an award of
arbitrators is pleaded it is necessary to state the
submission - the meeting of the arbitrators - the

Duplicity

Letter 231.

21/11/18 43%

A demand for duplicity must point out wherein the duplicity consists or it cannot be sustained & Johnson 436. 1 sound 33% m3

Where a deft pleads that the note on which a was given jointly by himself & A. & that the Off. had released it, it was taken good but a replication that the note was not a joint one & that the release was not Off. ent & a deed was laid for duplicity as the denial of either fact was a suff. answer to the plea. Off. sh. - hence per totum as to one fact & denied the other & Houd 130.

appearance of the parties, the learning findings &c. - all these facts being necessary to make this one defence. So also in an action for malicious prosecution Def pleads there was probable cause - he may & ought to allege all the suspicious circumstances which go to shew there was probable cause & those facts may be indefinitely numerous. (3 Bl 511. Burr 320 1 All 1028 2 Sal 142 Cr & 134. 871. 900 4 Bl 120) So too in an action for false imprisonment Def to avail himself of a reasonable suspicion that Pl had been guilty of felony may plead all the various circumstances &c. - & in those cases, the replication does not start demerit answer the whole - 2 New 121 Cr & 134 871. 900) But if to an action of false imprisonment Def relies on an act committed by Pl which justifies him he must plead it specially - Def being a peace officer Pl committed a felony in his presence - this constitutes a complete ground of defence - he has no right to add that for another offense he took & imprisoned Pl - for it would be a diff^t ground of defence requiring a diff^t answer - 2 Jo 335 -

Where the fact relied on in the plea is a mere consequence of another fact both may be alleged without constituting duplicity. Gore Pl. & 2 Hand 1140 1 Burr 320 -) In an action against an Ex^r he may plead "plene administravit" & therefore no assets in his hands - for if the first allegation be true the second follows of course

Distinct counts each of which is itself single may be included in one declaration whether they are intended to establish one or diff^t rights of recovery - they always appear on the declaration as distinct causes of action - But if diff^t parts of the same

Duplicity

If the quiverous complaint of me caused to have
arisen partly by the magnificence & partly by the
misconduct of the clergy the clerk is laid for duplicity,
3 March 150

Heads and Readings

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counts require diff. answers or where diff. causes of action are inserted in one count to enforce one & the same right of recovery, it is bad. It is customary to insert diff. counts when there is but one cause of action & where op. intends to enforce but one right of recovery - the object is that the cause of action may be variously stated so that if the evidence does not correspond with one count it may with another - Thus in left. P. declares for goods sold on a promise to pay as much as they were worth in one count - in another on a promise to pay as specific sum & in a third on an insured consignment &c - for if he should fail in proving one count he may then resort to another - & this to prevent possibility of failure

3 B 1290 -

mere redundancy does not constitute duplicity - If two defences pleaded one of which is frivolous. here there is but one answer required 1 Sid. 175 - 1 Keb. 561. Op. 42 4 B 419 -

Duplicity in the declaration consists in unnecessarily joining in one count distinct grounds of action either of similar or diff. natures to enforce one right of recovery - As where he declares against B. on an agreement to let him have all the grain, the corn out of his new house & also that he has freely & voluntarily mixed such with them whereby they were spoiled - declares broken bond for he should not have joined ground with contract - for proof of one would have amounted to breach of the other (Vent 355. C. 6 20 Com. 98 28 2 Vent 98 & R 4011 -) so in debt on penal bond the assignment of more than one breach is duplicity at C. S. - the defence may contain a variety of exceptions & all of them be broken

Duplicity

If one consents to convey by a day certain ~~to one~~
~~certain one~~ ~~but not~~ ~~plead~~ he is not bound to convey
until requested if therefore to one certain one ~~but~~
~~not~~ he pleads that he was not requested to convey
also that he did not refuse his place is bad for
duplicity for either part is an answer 7 March
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yet as a breach of one of them is a total forfeiture of the bond it would be of no more benefit to P^f to move a breach of all them of one only (Lat 108 1 Vent 114 126 2^o. 108 222 Comb 207. 2 Wils 267. Corn P. L 23. 1 Ba & 544 1 Roll 112 Lams 287) Issues in covenant broken. P^f may at C. & D. assign as many breaches as he pleases, as the action is not to recover the actual damage sustained by the breaches, but to not for a specific sum in numbers (Cro E 176 1 Ba & 544 5 Corn 96 4 Ba 131) & now by 829 Wms 3 P^f in debt is allowed to assign as many breaches as he pleases & 2 R 126 459 2 B. R. 1016. 1111. 2 Wils 377 Casp 357. Bun 820.

By 215 Linn Cest. may with leave of Court plead to any action as many distinct defences to the whole or any part of the declaration as he pleases - Issues at C. & D. Lams 27.

4 Bams 121 D R 1099. 2 B. R. 308 vid Lys 319.) A similar H. enacted here March 1815 -

The Eng H. comprehends no other than pleas to the declaration so that as to subsequent pleadings the rule remains as at C. & D. with the exception introduced by 829 Wms 3 4 Ba 121 5 Comb 9 vid Corn R 148 -

A double plea can only be taken of duplicity by special demurrer - but this is by 27 Eliz. - at C. & D. such plea was ill on general demurrer the laid down contrary in some books - But now the special demurrer must point out in what the duplicity consists - not suff. to say the pleadings are double & - 2 Ba 121. 34 1 Sams 337 Lat 219 678 D R 332 798 1 Lev 76 1 Wils 219 4 Ba 119 7 Macc 71 Cr E 14. 20 Cr E 810 Contra 5 Corn 36. 65 Lams 132 -

But if two answers are given & not demurred to for

Profert and Oyer

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duplicity the other party must answer them both - he may traverse both & his traverse will not be double - for if he could answer only one after declining to answer for duplicity, judge must necessarily go against him for that which he was precluded from answering by the rules of pleading - but in this case each traverse must be single - Went 232 4 Ba 119.

The demurrer need not be special when P^{ff} joins in one declaration diff^t causes of action which cannot be joined as distinct & substantive rights of recovery - for this is misjoinder the object of which is to enforce several distinct rights of recovery - Ex. P^{ff} declares on a note in one count & on trover in another - this is an irremediable defect & will support a gen^l demurrer - arrest of judge or writ of error - but duplicity is joining several grounds of claim to enforce one right of recovery - 4 Ba 11 13 R 274 - 8 Co 87. Sed 10 Ray 233 3 Lev 99 Corb 333.

Proper and Oyer

Gen^l rule of C. D. that where a party declares on or otherwise pleads a deed he must plead it with a proper - i.e. over that he brings the deed into Court - Com Pl. C. 6. 381 App^l 22.

Proper is made that the other party may have oyer - i.e. - have the deed read - & that the Court may inspect it - 6 Co 38. 10th 93 40th 233 381 299 Same. 96 Lev 217 4 Ba 113. 119 5 Com. 128 -

The adverse party entitled to oyer is not bound to plead without it. if he does he receives the right - Sed 119 6 illod 283 4 Ba 113 -

Profert and Over

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In Eng^d profect is not made on bills of exchange or promissory notes - for they are not deeds or specialties - i.e. are not instruments on which the action is performed but mere evidence of agreement. C.B. 183 Bury 243 -

If a right acquired by deed will profect without deed he who claims the right is not obliged to plead the deed & of course not bound to make profect - his assignee of a lease at C.D. need not in pleading aver it to be by deed - But if the right acquired by deed will not profect without deed it must be pleaded & if he make title under it he must plead it with a profect - Thus at C.D. the grant of an incorporeal hereditament can only be by deed - which must be pleaded with a profect - 6 Co 38 James 97. C.B. 113 1 Bulst. 119. 1 Sams 9. 5 Br 156 4 Ba 110 Ht. 159.

Where a right will profect without deed yet if the party plead the deed & make title under it he must plead it with a profect - Series if he plead it without making title under it - i.e. founding his claim or defence upon it - As in an action of profect per sale of goods P^r declares that by bill of sale C^o sold him goods & delivered him - here he need not make profect of the bill of sale for it is only inducement & not the gr^o reason of the action. 2 Mo 64 6 Co 38 James 97. 4 Ba 110

Genl. rule that a stranger to a deed may plead it without a profect - for he is presumed not to have the controul of it tho it may be necessary to his claim or defence - It may be brought into Court by ex sub poⁿe deces tecum - 10 Co 94 1 Vent on Ver. 394 3 Lev 80 Pl^o 129 1 Sams 9. 4 Ba 111. 2 Mo 415 Mo 870

Profert and Cyer.

The omission is matter of form merely, § Same 402.

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Rule the same in genl. as to any one who becomes
entitled by operation of Law - 4. Tenant by deed - She
may to assert her right plead or deed to have been in
in his life time without a profect for the title deeds
belong to the heir - 43a 119 1 Inst 225 - 2 Inst 305 5 Co 75 -
Exception in the case of tenant by the Curtesy - If he pleads
the title deeds he must plead them with a profect
for he is supposed to have them in his possession 1 Inst 225
5 Co 75 10-94

But he who is heir to the original grantee must make
profect in those cases in which the original grantee
himself would have been bound to have done so - As
if he make title by deed to his ancestor he must plead it
with a profect - except he is heir at law to his mother
or his father is living - 1 Inst 267. 37. 10 Co 92-4

A party who pleads or swears need not make a profect of
it even tho he claims under it - for tho it may be the
foundation of the party's rights yet they are not their
private instruments - they belong to the Court & the
parties cannot of course take them from the office -
Lewes 97. 6. 2 Inst 237. Bull 252 - 1 Inst 255 - 3 Inst 529. 1 Inst
95 18 R 149.

P In Eng an admistr must make profect of his letters
of administration - for the Ecclesiastical Courts are not
Courts of record - the letters testamentary are delivered to
the party & a counterpart kept in the Court so that
he has no original - Lewes 96

Robert and Oyer

1612. 292.

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If a deed is lost by time or accident or destroyed by casualty it may be pleaded without proof - for the law will not permit permit that the party should lose the benefit of his deed when this out of his power to produce it - shall the same when the deed pleaded on one side is in possession of the adverse party (5 Co 74. 5 1 Wil. 16. 1186 3 RR 151 - 13 Ann 9 1 Boul. 14. 15 1 Mol. 109. 3 Litt 17. 1101 392) & in such case the party who pleads must state the special fact in his plea or it will be held & Litt 61. 1306. 218 2 Root 1182. 1-3 245 116092.

But if the party in these cases plead with a proof the other will be entitled to overt & is not bound to answer without it - In case of mistake of this sort courts have allowed the party to avow the proof & state the special matter 1 Ann 9. 1101. 16 3 RR 153. n -

Proof of an instrument is only required when the party invokes title under it - Secus when it is merely inducement 8 RR 573. 93 10 Co 38. 6^d 386. 92

In our practice proof is unnecessary - for overt is here deemed double without it where proof is necessary in Eng - 2 Root 568. At C.L. on omission of proof when necessary was all on special demurrer - 13y 426 Ann it is reduced to matter of form - Cr 1513 - 1101 304. Lev. 217 1130 113. Cr & 247. Cowles Hall - 54

When a deed is thus lost or destroyed or sworn copy or even probable overt evidence of its existence is admissible - It must first be made to appear the fact probable that it is lost before this secondary evidence is admissible.

Profert and Cyer

In Eng. when a bill in Chancery is filed to obtain
relief on an instrument lost an affidavit of the loss
must be annexed to the bill. Co. p. N. 126 146 346
3 Austr. 859.

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Ch. D 204, 2 R 231. 10 C 92. 29.30 1 W. 244 7 C 65
8 273. 1 R 247. 6 R. 1. 852. 1 R. 337. the case in 1186 is
a matter of practice only.

2 In Calvin v. Wolcott C. En. decided that off oath was
not admissible to prove the loss of the instrument
but the party's oath as to mere matter of practice is admissible
- but in the other case because the fact of the loss goes
into the issue & is tried by the Jury - for the evidence is
first submitted to the Judges to make the loss appear
probable before secondary proof can be admitted yet
their decision does not conclude the Jury - Same
secondary evidence admitted when a deed pleaded is in
the other party's possession - tho in this case notice must
be given to produce it - for all due means must be used
to procure the original before secondary proof is admitted
(1 C 50. 2 R 1056. Ch 325. 1 R 50-) as if in the
hands of a stranger -

when proof is made the other party is entitled to
oath - Same if unnecessarily made - as when the party
pleading does not make title under the deed - it is mere
surplusage - Same 97. 1 C 497. 2 C 529.

But if unnecessarily proof is made of a deed under which
a party claims, the opposite party is entitled to oath -
here it is not surplusage - for the supposition is that by
pleading & making proof of the party makes his claim
or defense upon the deed - Same 95. 1 C 497. 2 C 521. 2 W. 395
2 C 1176. 1 C 2176 -

A party making oath when entitled to it has a right to

Profert and Oyer

No right to have oyer of a record / 1846 150 & Co 74 Burns
8/ or of an original writ / Burns 240 Ed Doug 215 1846
150 Contra in Ct 2 Root 1162

Actions of debt are here conditioned for performance of writ -
Ct cannot place conditions for performance without first requiring
oyer of the cond. of the writ & setting it out in habeas corpus
then stating the whole substance of the deed containing
such writ & making profert of it - 1 Green 8. 2. 410 n 2
120 50 qy 425 1846 37 All- 72 1846 5.

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take a copy as well as hear it read. 40b 217. 4 Ba 113 -

Granting oyer when not demandable is not error -
But refusing it when it ought to be granted is - in the first
case granting oyer does not affect the state of the pleadings
but the refusal in the latter case does - but the party
to take advantage of the error must enter his plea
on the record otherwise the fact will not appear so
that error can be founded upon it. 408 2 James 99
Saunders 9. P.R. 969. 6 Moe 28 -

The party obtaining oyer may enter the plea on the
record libation & thus take advantage of any defect
or condition in it - He may recite the instrument
& then examine between that & the one declared on
by the other party - As if the action is on a parcel land
he may recite the condition & plead performance. 3 M 299
James 98 6 Moe 28 4 Ba 113 -

After reciting it if the instrument appears on the face of
it to be illegal or insufficient, no law to create a right or duty,
or varies in the description he may demur - If the
ground of defence furnished by the recital does not appear
he may demur it appears by enrollment - As in an action on
a parcel land to enable the party to plead performance it
is necessary to recite the condition or it will not appear
there was one & still the performance being alleged
& not appearing on the record must be averred. 3 Moe
342. James 99.

If the plea is falsely recited on oyer the other party may sign
judgment per want of a plea - for the party entering

Departure.

Def^t pleads non damnicatus. It shows how he is injured 10th 304 a
Def^t rejoins that Off^r was damaged of his own wrong & is a
defendant 1st id 444 1st id 43. 2nd Kelo big 2nd id 83 / 2nd id 83
have been pleaded at first 5th 114 Com^r 533. 2nd id 96
vid 2nd id 84 b.c 4th 504

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obtaining ages implicitly understands to set out the instrument as it is - by reciting falsely the tenor condition is broken - or he may promise the instrument to be enrolled by an officer of the Court in this case in hæc verba & then deliver - Stea 237. Gault 201 1 Saundg. 316 43 R 370. 5 Com 134 -

Departure

This is a declaration of one claim or defense for a matter which is distinct from & does not partly the former one. Suppose Plaintiff pleads a joinder in law & in this rejoinder set forth a gift in tail - this is a departure 1 Inst 203 Plance 105 Lane 163 241 310 Stea 422 Ray 22 I.R. 1149. 2 N. 1280 5 Com 90 123 -

If matter of fact affirmed in one side is pleaded, as at C.S. a subsequent plea by the same party supported by a particular custom is a departure 1 Lev 81 11 Reeb. 376. 409 512 43a 123 -) So if the party asserts a right at C.S. & attempts to partly it by St. as in trespass for taking cattle Plaintiff pleads that he took them as a feasant - Plaintiff replies that Plaintiff owns them out the County which by St. Marshall means subject him to the C.S. would not - this is a departure - 13a 121 2 Lev. 48 - 1 Inst 304.) But if one pleads a St. & the other replies that it has been repulsed a rejoinder that it has been renewed will not be a departure - for this partly the plea - If in covenant broken Plaintiff pleads performance generally - Plaintiff replies that he has not performed on particular point of the coven. a rejoinder that he

Departure.

a. that is - in all cases, where the day, laid in the deed is, not material - for if the day be laid, be material (as in action on bond) off in his replication cannot vary from the day, without a departure - 2 Sams. 5. 6. Bro 2168 120 110 111 120 222 223. 15. 2. 121. 1075 110 21 806 -

B If Def^t instead of demurring take issue upon a replication containing a departure & it is found agt him Jud^t will not be arrested 30 May 86
2 Sams 84 d - 14 John 134 that departure is laid on quest. seen since 2 108. 96 1 116. 122 4 116. 504 116. 138. 25. 27 1 116. 623. 2 116. 120. 329 10 John 259

| | |
|---------|-----|
| 22 Wils | 96 |
| 120. | 122 |
| 48R | 504 |
| Wils. | 638 |
| | 25 |
| | 27. |

Mans and Pleadings

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is ready to perform & a tender of performance is a
departure - 1 Inst 204 1 Sid 10 11 Mod 442 4 Bar 123

1 Lev 81 5 Com 99

M. Lamb. is tender. C. B. - C. B. on an agreement to purchase stock
of the bank of U.S. - the declaration issues a tender of the stock
at N.Y. - plea law of U.S. requiring all transfers to be made
at the bank in Philadelphia - Replication - tender at the
bank in Philadelphia - holds no departure - plea
first alleged not material - 11 Mod 222 4 Bar 125 6 Mod 115 -

A more particular statement of the course of action in the
replication by way of non assignment is no departure &
1 Leon 28. 225 3 Mod 20 2 Blk 211. 1 Bull. 16 1 Lamer 164 - 2 Sourd 5. 11 -

- 4 Departure initiates the pleading, on genl. demurrer count-
ing to the letter of opinion, B. It is aided however by verdict
- for the verdict presupposes that suff. appears upon the
whole record to entitle the party to judgment - As in action
on contract Def. pleads infancy - P. replies non paries
Def. rejoins release & that is found by verdict - verdict
finds a good defense tho it is an abandonment of the first
2 judgments may be rendered thereon - It may be asked why
is it not good on genl. demurrer? The reason is that a
genl. demurrer does not wrap the facts which are
alleged ill pleaded - 1 Inst 221 May 22. 94 11 Mod 422 Cr. B
165 or 228 May 86 1 Lev 110 1 Sourd 177. 117 2 S. 24. 1 Field
889. 1 Kel 566 4 Bar 125 - P. may now assign with or
without taking issue on the plea (Lamer 240 1 W. 479
626 Story 523. 4) Departure initiates the pleading, on
genl. demurrer - Lamb. 1 Inst 221 May 22. 94 11 Mod 422 Cr. B. 165. 288

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Demurrer

Pleas and Pleadings

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Demurrers

A demurrer is the denial of the legal sufficiency of facts stated or allegations to which it extends. It admits those matters of fact alleged by the adverse party as well pleaded but denies their sufficiency in point of law & refers the question of law arising upon them to the Court. 3 Bl 314, 1 Inst 71. Com D N. B. 945 1 Sess 338 n 3 Lane, 167. 9 Hol 233 quod vide

A demurrer always averses a legal proposition - or plea properly so called averses or denies some matter of fact - hence a demurrer is not a plea but as it is sometimes called an excess not pleading. It neither alleges or denies any fact - the Eng. form shows it is not rendered as a plea. It is that the party demurring has "no occasion & is not bound by the law of the land to answer" - 43 a 129 3 Wils 292 vid Lane 43 3 Bl. App. 23. 4 -

A demurrer may be taken to any part of the pleadings & to dilatory pleas as well as pleas to the action - 1 Inst 72 5 Mod 132 -

A demurrer whether general or special admits at C. L. no other fact than such as are well pleaded but in matters of form - At C. L. defects in form were reached as well by general as by special demurrer - but by 27 Eliz- advantage could be taken of defects in form by special demurrer only.

A general demurrer confuses all informal defects as are avoided by these &c. & in general and all informalities Com D. 15 Hol 56 238 Lane 167. 9. 1 Sess 338 1 Ber 945 2- 131) Thus in avt. broken off signifies one break well & the other ill &

Demurrer

A genl. charge in a declaration that deft. as director &
loaned the funds of the corp^y upon insuff. security
knowing it to be such without any specification of time
persons or circumstances is bad on demurrer 3 March 180
164255 17 Johns 439 & it should be averred of what
the funds of the corp^y consisted 3 March 180

Pleas and Pleadings

Nov. - 244

Def^t. seems to the whole either generally or specially as the case may require - Off^r has judg^t only on those well assigned Hott 191 1 Wils 248 Hob. 156 223 Sa 248 1 Lamond 279 Dia 10 Com Pl. C. 3 4 Bar 121 Lamies 187 Co S 135 - A matter being ill pleaded is itself a cause of demurrer Sid 110 , A demurrer never confesses an averment which contradicts what before appears et tunc on the record. Thus if one pleads a former record to which he was a party & then makes an averment inconsistent with it has been. 2 Le 124, Co L 25 or 30 Sid 10 Lamies 188 Com Pl. Gg.

It never confesses an averment that is impossible - or admit facts which cannot be legally proved - the avowment of such facts is cause of demurrer. 6 Co 244 2 Wils 376 Yolkt 193 Co S 254 Sid 10 as to debt on bond Def^t. pleads a release without shewing it to be legal - plea bad & the fact not admitted by demurrer. It admits no allegations not material - not traversable or those which are immaterial - for these cannot affect the judg^t & nothing is confessed which does not affect the claim of the adverse party. Sa 561 Lamies 168 4 Bar 131 5 Com 139.

It never admits conclusions of law made by the adverse party from facts stated - for matter of law being determined by the court is not a subject of admission on the record pleading - If a party should agree to a legal proposition on the record which was not correct it would be a conclusion of law. Hob 56

After an issue in fact joins there can be no demurrer - i.e. - after the issue on one side is closed by a similiter on the other since an issue improperly tendered is a subject of demurrer

Demurrer

When judg^t has been rendered for Affen demurrer
claf^t shall not enter the demurrer & please to the
action 3 Co 25 27 Co L 446

Pleas and Pleadings

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Even a demurrer may be taken to the general issue - i.e. "Not guilty" to an action of debt. 1 Show 212.

A demurrer is not properly in issue in law - it merely tenders in issue in law & the issue is closed by the opposite party's joining in demurrer. (Daff. says the pleading is not sufft. in law. P. replies that it is sufft. - here is an affirmative & negative of course in issue -

3 W 1334 1 Inst 71. 126 Lawes 43 Hob. 56 4 Bar 54. 129.

There cannot be a demurrer to a demurrer such pleading would be a discontinuance on the part of him who takes the second demurrer. So Holt says a demurrer to a plea in abatement may itself be demurred to - sed qd. a demurrer when taken to any part of the pleading, whether apt or unapt raises a question of law - whether it can be supported or not - if unapt the other can demur to no matter of fact - A demurrer can only be taken to matter of fact. Corb 306 2 R 20 Lawes 172. So Holt's opinion in Lawes 172 con. Sed. 219 see 2 N R 453.

Genl. rule that when a demurrer & issue in fact are joined in the same cause as they may be the demurrer is first to be determined & it is however discretionary with the Court - tho' the most usual way - for if the demurrer is first determined & the Jury afterwards find the issue in fact for the same party they may assess the damages on the whole - but if the issue in fact is first found there must be a new day to assess the damages on the demurrer (1 Inst 75. 125

Perlm 517. 4 Bar 130 5 Com 136) & in such case if a demurrer is found for P. he may enter a non. pro. as to the rest & take judgt for that. Sed 219 tho' 574 4 Bar 130 5 Com 136

Some of a demurrer in Ct. "that the pleading be a matter contained therein are insufft. in law & hereof he prays judgt" - Not necessary

Demurrer

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the in Eng^l usual to conclude a demurrer with a confession for the issue is necessarily allowed by a demurrer. Lames 172. Folwell 132. For Eng. form 1 Leon 24. 4 Ba 130 1 Inst 71. 2 Bl 1 aff^d No 3

Just^{ice} on demurrer in civil cases except when taken to a dilatory plea is in chief - when taken to a dilatory plea - just^{ice} is responded outside - If Just^{ice} demurs to declare or If to plead in bond the demurrer is overruled just^{ice} goes in chief against the party demurring in both cases. - Lamb 306 Sedgwick 69. 241 4 Ba 132 -

Rule the same in criminal cases, short of felony - Lames in cases capitulated in favoramitta - 2 Hen 334 Cr. E 196 11 Co 60 -

4 Bl 1334 - Contra but not law 2 Hales Pl 239. 257 215 -

If Just^{ice} when he demurs to declare concludes his demurrer in rebuttal i.e. by saying just^{ice} of the writ - If any joins as in bond & pray just^{ice} in chief - for the demurrer confesses the declaration & prays that the writ abate - it cannot therefore be supported - Lames 172. 3 Leo 223)

Demurrers are of two kinds - General & Special - One which does not assign any special cause of demurrer is a general one - & one pointing out a special particular defect on which it is founded is a special demurrer - Lames says, special demurrers were introduced by 27 Eliz³ - Lamb not - They were made necessary by that Stat in certain cases where a general demurrer would have answered at C.E. - but they were in use long before that St. & probably as long before as demurrers were known - 10 Cohe says that anciently all demurrers were special - 1 Inst 172 Lames 127. 167 Hod 232. 18 Ann 337. 1 Vent 204 - 2 Bulst. 267. 4 Ba 132 -)

To constitute a special demurrer there must be a particular cause assigned & it must be assigned in a special manner - for if one assign for cause of demurrer that the declaration is

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Demurrer

1st. ¹clus^d of ²second^d count. Then ³third part of the sum
mentioned in the third count & \$20. part of the sum
mentioned in the first & second counts are one & the
same debt of \$20. & not distinct debt of \$20. held
back on special demurrer for not showing how much
of the \$20 admitted to be due on the first two counts
was admitted to be due on each of these two counts
separately ³²6 L. 93. 5 Nev. & Man. 624 3. Meigs's
weekly 189 2 Cr. M. & R. 564

Pleas and Pleadings continued

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uncertain or informal the demands would be given for the
uncertainty or informality is not pointed out - 1 Wils 219 -
1 Kraw - 42 - Comb. 297. Bk 798 4 Bca 132

A special clemency reaches all defects which a gent. one does & also those which a gent. one does not reach - distinction - all substantial defects overreached is well by special or by gent. clemency but by 425 him. defects in form are reached by special clemency only - tho at C. L. a gent. clemency answered the same purpose - Kent 240. 11 East 267. 10 C. 88. 1 Inst 72

Sta- 524 Nov 12. 1643 B1315 - Corn N. 2-56 James 167. Batch 185
4 Bar 32 - Nutt 15 - 5. Mace 18 Feb. 291. -) The St. Eliz. does not
extend to appeals, indictments, presentments or seizures on
penal Sts - the C.D. rule prevails as to those - The St Ann
only extends the principle to particular cases, but introduces
no genl rule Corn N. G. 7. 4 Bar 134 -

In all pleadings with ^Pin matters must be stated & expressed according
to the forms of law - the want of either of these requisites furnishes
good ground for demurrer - the want of the first or ground for
special Verdict 2. of the last for a special demurrer... 13 Bar. 110
303 466 64. 332. Bk 298 882 - 181 184 6 ante 389. 16 am 128 134 634
331. 394 -

"Whether it is without which the right of the case does
sufficiently appear to the Court it is form within the law
so a converse whatever is wanting or imperfect by reason
whereof the right appears not it is matter of substance (Vol
232) If action on contract by the terms of which a condition
precedent was to be performed by off. & he omits to execute
performance - This is a defect in substance for without

Demurrer

* A special Plea amounting to Genl. Issue is not a ground
of demurrer tho' the Court may disallow such Plea &
leave the genl. Issue to be tried Day 232

Pleas and Pleadings

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a performance on his part no right of action accrues -- If in action of slander Pff omit to state that the words were spoken falsely & maliciously it is a substantial defect (4 Ba 132 1060 98 Earth 175- 1 Inst 72-) But duplicity is a formal defect the error is not that suff^e does not appear but that too much appears - so want of venue in transitory actions - so special plea in law amounting to gen^l issue. 4 Ba 219 134 2 Root 17 x

When there is a total want of substance a gen^l demurrer will answer - Exclusion of Slander for calling him a Jew - So also if a material allegation is omitted - If the answer if Pff should not allege property in himself or in the prop^r should not aver prop^r - substantial defect - for the object of the first action is to recover damages for the wrong - in the second for the violation of Pff's prop^r. 1 Inst 72. 3 M 394 Earth 389. 1 Hia 184 - Hia 624 -

If on the face of the writ the party is estopped from pleading a fact but still pleads it the other may demur generally or reply the estoppel specially. Willis 13 Semes 170 140 G. 158. 161 -

A Special demurrer reaches no defects but those specially assigned - it reaches all substantial defects - for as to defects not specially assigned it is a gen^l demurrer 10 Co 58. 4 Ba 132) Gen^l rule that if on demurrer to the declarⁿ Judgt is given for Pff^t no similar or concurrent action can afterwards be bro^t for the same cause - so if for Pff - for Dff might plead the former recovery in law (Foehe 236 - 6 Edw 20 3 Inst 240 Co 8 35) But to make the cause the same within the rule it is necessary that the same grounds of

Demurrer

quidam dicitur

[Faint, mostly illegible handwritten text in a cursive script, likely a legal or historical document. The text is written in dark ink on aged, slightly discolored paper. There are several dark spots and stains, particularly a large one on the right side and another on the left side. The handwriting is dense and fills most of the page below the title.]

Pleas and Pleadings

1797 1113 246

claim, should have been disclosed in the first action as one disclosed in the second - Reg 1172. 2 Vent 169. 2 Wil 240 181R 827)
But if Pff files in his first action for want of a material allegation which he inserts in his second - the judgt in the first will be no bar to the second action - As in Hemmer Pff omits to state in his declaration that the words were falsely & spon. & files an demurrer for that defect - the judgt will be no bar to a second action where these words are inserted in the declaration - So if Pff misconceives his action he may still bring his right action - 4115. 6 Allod 20. 111 Vin. 610. 6 Coz. Cr & 35 - 1811 81 3 Wils. 241. 300 Eup 145 - 281R 779 831. 27. Cr & 667 2 Vent 169 Reg 1172. 2 Allod 218 P. 1.

So also Pff is barred by a former judgt. for Def. if he files on the genl issue or any other plea to the action - & the same distinctions are to be observed as in demurrers - for after the right has been once determined he cannot have a subsequent action for the same cause - Cr & 68. 6 Coz - 9 In Engl a judgt against Pff in one real action is no bar to another action of a higher nature - for the bar is neither a similar or concurrent action with the first - tho as the same subject may be in controversy yet a diff right in law is claimed - In Engl - there is a gradation of real actions each adapted to the trial of a particular right 6 Coz. 4 Ba - 115 -

tho the declaration be insufft. this mistake in pleading yet if Def. takes no advantage of it but pleads for bar on which the right is found for him - Pff can have no other action for the same thing because of this insufficiency

Demurrer

13 R 141
Doug. 679
a 654

If a checkⁿ contains several counts some
good & others bad & a demurrer to the whole
off shall bea judg^t generally on the whole checkⁿ
the demurrer should have been taken to the
bad counts only, 34 C. L. 240 2 Cr. M. & R. 692
Frysho & Cr 141. 11 East 565.

Pleas and Pleadings

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the merits having been tried - & Indorse for bill of exchange against Indorser. Pff omits to allege notice - this is a defect which even a verdict for Pff will not cure. But if Pff pleads to action & verdict is found for him Pff can have no other action for the same cause - D R 1180 9 Co 150 3 & 25, 8 Hob 377, 6100a 207. Shinn. 130 4 Ba 116. In May 184

Been determined both in Ct & Eng^t that a judgt against A for paid in falsely recommending B as worthy of credit is no bar to an action against B on the contract which the recommendation created him to make - for the first action is founded in malificie & the damages recovered are not as payment to Pff for the goods sold but as punishment on Pff for want of good faith &c - 3 Lp R 208 1 Day 22. Peake R 124 Peake L 172 -

A demurrer must extend to the whole of the pleadings on the other side unless some part is otherwise answered - If Pff demurs to a part & gives no answer to the residue it is a discontinuance & Pff may take judgtⁿ as per nil obicit - So if Pff demurs in part leaving the rest unanswered Pff may take judgtⁿ as per want of a replication Same, 171. 161 - Com R. L. 1. Lwells 481. Lord N. P.

4-

A demurrer reaches thro the whole record & attaches upon the first substantial defect in the pleadings & if the parties join demurres on one single point judgtⁿ must be on the whole record & he who is entitled will recover - Suppose to an insuff^t declaration Pff instead of demurring makes a special plea in bar & Pff demurs to that plea - Pff loses judgtⁿ - Suppose declares good plea

Demurrer

Once judge on demurrer Doft an motion may be heard in
damages 1 Root 367

Where you go back to the place of your adversary
to take advantage of its being bad you can object
only to such defects as are ground of quod demurres
15 Johns 191 3 Mand. 44.7 Lous. 46.

In Chancery a plea shews such own merits & the
party cannot in case of his defective plea object the
insufficiency of his adversary's plea pleading 3 Briga
419 2dls 140 1 Kern. 78

Said in 11 Mand. 453 that when a plea is given to the whole
action "that you shall not go back & object to its sufficiency
but in 16 Mand. ²⁴ this rule is confined to such defects as are
caused by accident if not thus cured the Motion may
be taken the assignable place has been given

Pleas and Pleadings

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in bar bar-replication leads also on Post-pleas. - If leave, judgment
for the first defect is in Post-2 a lead replication is good
enough for a lead plea - Mod 56 199, 200. Sa 1438. 519 D R 710
19 Co 110 b 120. 133 3 Lev 244 5 Com 140 4 B & 1317 Sec 285
2 Kent 79. and 2 Nels 150 as to the mode of entering judgment
This will explain the legitimacy of pleading procurator
or stump pleas - An out-of-pocket will many times make
a plea which he knows to be bad in order to deny the
other party rule or demurrer - As if Post. by making a procurator
of a plea in bar will withdraw the attention of Pff from
defects in his declaration which he has demurred to in the
first place would probably have discovered & considered. But
in debt on bond for the performance of covenants or condition
if Post. pleads an insuff plea & Pff a replicative replication
to which Post. demurs he shall have judgment the
first fault was in his plea - for in actions on
personal bonds the true cause of action does not appear
until the replication & this is considered as a supplement
to declaration which does not notice the warrant - so that
naturally the first defect is in the declaration - There,
9 H 3652. 8th 120 Cr 133. 225. D R 1080. Palm 285.
If Post. relies on several pleas in bar as under the 4th he
may waive) & one of them is demurred to & found for
him judgment will go in his favor tho the other is found insuff
- for one defense being rejected it appears the Pff has no
right - Burr 760 Sec 80.

Demurrer to Evidence

[The following text is extremely faint and largely illegible due to fading and bleed-through from the reverse side of the page. It appears to be a legal document, likely a demurrer to evidence, containing several paragraphs of text.]

Demurrer to Evidence

In certain cases when an issue terminates in an issue of fact one party may take the cognizance of the cause from the day and refer it to the Court by demurring to the evidence which the adverse party exhibits - Thus in debt on bond Post. Pleas non est factum & supposing the evidence decidedly off will not support the debt^a because he has counted on a bond dated May 9. & the one produced in evidence is dated July 21. tho in this case there is no need of demurring as the issue must be found for Post. 4/2 if he pleases, he may demur to the evidence thus take the examination from the day & refer it to the Court 3 M 205 - 1 Inst 72. 4 H. 18 D 6 204 4 B 136 Bull 313 -

The demurrer must be taken before the party demurring has exhibited any evidence - for the demurrer does not go to all the evidence on both sides if it did it would refer to the Court the comparative weight of the testimony which is the province of the Jury to determine - perhaps however the party may be allowed to withdraw the testimony he has exhibited & then demur Bull 313. 1 Root 570

The demurrer must be taken on the whole evidence adduced by the other party - for the question is whether it is unavailing in law the proposition contended for by the parties intruding it - & I presume the demurrer can only be taken to the evidence of that party who assumes the onus probandi - as his evidence is always first adduced - Dy 300 1 H 18 205 -

Demurrer to Evidence.

The relevancy of testimony is always a question of law to be determined by the court - the relevancy being established - how far it conduces to prove the issue is a question of fact to be determined by the jury - All the law which bears relation to demurrers to evidence has relation to this distinction (2 H B 1205 Doug 360) of course it never can be proper to demur to evidence which is clearly relevant to the issue however weak it may be - If on the great issue ~~off~~ offers any evidence which in the least conduces to prove his claim the other party cannot demur or if he does his demurrer will be overruled for the Court cannot decide the weight of testimony or what reliance the jury ought to place upon it (2 H B 1205)

Evidence is always relevant to any issue which it conduces in any degree to prove however weak loose or indeterminate it may be - So if it conduces to prove any part of the issue it cannot be demurred to - The demurrer puts an end to the question of fact & refers to the Court the application of the law to the facts shown in evidence - of course a demurrer to evidence must admit all the facts shown in evidence - like all other demurrers denies ~~all~~ the legal sufficiency in favor of the evidence party to support the issue - Inst 72. 2 H B 1205 4 B & 136 2 Low. 126

Evidence irrelevant however strong it may be is always the subject of a demurrer - i.e. if the whole is irrelevant - for if any part is irrelevant to the whole issue it is suff - The fact must be ascertained before the question of law can arise on the demurrer - if the demurrer is so taken as not to settle the

Heads and Headings

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matter of fact - will not enable the Court to render judgment at all - for they cannot apply the law to the facts unless they are ascertained or appear on the face of the record - in such case therefore the Court will order a venire de novo to try the issue
2 H. Bl. 205 -

When the whole evidence is written it is always a subject of demurrer & the party exhibiting it must always join in demurrer or waver the evidence - for being written it is made certain & there can be no variance in stating it upon the record - Ex. p. 3
Plead exhibited in evidence of Little - 5 Co. 114 Cr. E. 751 1 Inst. 72 3 Bl.
372. 1 Root 571. Bull. 313 Baily 106 21 Bar 106 -

But the question how far the party exhibiting parol evidence is bound to join seems not to have been settled for many - some holding (1 Inst. 72. 5 Co. 104 3 Lev. 87) that he was not bound at all for there might have been a mistake in putting it on the record - others that he may (Cr. E. 757 21 Bar 136) always be compelled if the evidence is fairly stated - It is now clearly settled that when the evidence is parol the parties may join in demurrer if they please - So if one party produces any testimony (parol) to prove any definite fact the other by admitting the fact on the record may compel a joinder in demurrer or a waiver of the evidence - this case will seldom occur for the main fact will generally be relevant - suppose in trover A introduces evidence to show B. was guilty of negligence in keeping the goods - here B. might safely admit the fact of negligence & compel a joinder in demurrer (C. H. 18 2 H. Bl. 208) & it seems now to be settled that if the parol evidence exhibited

Demurrer & Evidence.

Heas and Readings.

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in support of the issue is certain (i.e. direct & explicit as contra-
distinguished from indeterminate & circumstantial) the adverse
party by confessing it to be true on the record may compel the
other to join in demurrer or waive it. (2 H.B. 206-) Ex. Inst. 10p
says "I believe the fact to be true" or "according to my best
recollection" &c. If the opposite party demurs by merely confessing
the truth of the testimony his admission amounts to
no more than this - that the witness believes the fact to
be true - he must admit the fact itself - Bull. 218. 5 Co
104 - 2 H.B. 207. - So by admitting bare & circumstantial
evidence to be certain & direct whether it is found
or written he may compel a joinder in demurrer -
Circumstantial evidence concludes to prove every fact to
which it is relevant - Doug 114. 27. 9. All. 18 Hc 22. 34 -
When evidence is circumstantial if it is not admitted the facts
which it concludes to prove is not ascertained - Or where
circumstantial evidence was introduced to show that the
captain of a bill of exchange knew the name of the payee
which was endorsed to be fictitious - the truth of it being
the admission extends to the facts themselves as well as
to the circumstances, - 2 H.B. 205 -

If the party demurring in the two last cases does
not make the admission on the record which the rule
requires the other cannot join in the demurrer but
must pray judgment that his adversary should not be
permitted to demur unless he will confess &c. - But
if he actually joins no judgment can be rendered - but a venire
de novo must be awarded - for the demurrer would as for

Demurrer to Evidence.

[The following text is extremely faint and largely illegible due to fading and bleed-through from the reverse side of the page. It appears to be a legal document, likely a demurrer to evidence, discussing the admissibility of certain testimony or evidence in a trial. The text is organized into several paragraphs, with some lines beginning with "The evidence..." and others with "It is submitted..." or similar legal phrasing.]

the truth, weight & relevancy of the testimony to the case -
 Bull. 313. 4 B. & A. 137. 2 H. & M. 209

Decided in 6th that the party introducing peroral testimony was
 not bound to join in a demurrer before a dispute of the Pleas - for
 it would serve only to entangle his proceedings - but I see
 no legal grounds for this ~~persecuting~~ decision tho the reasons
 of it may be true in fact (Hil. 352. 2 L. 257) Now cannot
 a reason be adduced to to control or affect a question of law? -
 Holden also that the party introducing testimony peroral
 but chiefly written was not obliged to join in
 demurrer tho a statement of the evidence was agreed
 on - but this cannot be law 2 Swift 257.

On demurrer to evidence the only quest for the consideration
 of the Court is whether the evidence to which the demurrer
 is taken is such as ought to be left to the jury in support
 of the issue joined - i.e. whether it concludes to prove
 the issue in fact - hence on such demurrers no objections
 can be taken of any defect in the pleadings for
 the issue does not extend to them - but if there are
 substantial defects in the pleadings advantage of
 them may be taken afterwards by motion in arrest of
 judgment after verdict Bull 313. P. 208. 13 post

The party to whose evidence demurrer is taken may
 always demand judgment whether he ought to ~~answer~~ assess
 join - not a joinder of course - for if there is no colourable
 cause for demurrer it will not be allowed 4 B. & A. 136 Bull
 314 M. 18. 2 H. & M. 205-8

When there is a demurrer & joinder it is usual for the

Demurrer to Evidence.

Court to discharge the Jury - for the effect of it is to take the issue from the Jury requiring the Jury to attend & assess damages is done afterwards - still the court may direct the Jury to assess damages provisionally & then send a judge for whichever party prevails - this is not usual - 2 H Bl 200 Bull 314 Ck 143 Ld R 60.8 Sd 284)
In Ct - the damages are assessed by the Court (Rat 370
2 Lu 258)

The party cannot demand for the admission of improper evidence - tho if he considers the whole inadmissible he may demand - but in this case he refers the question of sufficiency to the Court which admitted it - proper way - bill of exceptions or motion for new trial - Discretionary with the Court to admit or disallow evidence or not - if the judge & refuse to admit it when it ought to be admitted a bill of exceptions is the proper remedy - Bull 314 Sd 284 1 Ba 326 9 Co 13' Ck 249 or 337 4 Ba 136)
1 Son. 331 -)

The whole of the proceedings on a demurrer to evidence are under the direction of the Court & when there appears no reasonable doubt on the point of law they may refuse the demurrer - 2 Roll. R 147. 2 H Bl 208 Bull 314)

The party demurring to must recite the evidence on the record & then allege that the evidence above recited is not sufficient in law to maintain the issue & conclude by praying judge that the Jury be discharged from giving any verdict on the issue & that damages not be assessed to him - in the form

Arrest of Judgment

It is no cause of arrest that the Jury have formed a verdict upon
insuff. evidence. / 1 Root 130 / for they are the Judges of the weight
of evidence. Rind 61 / or on evidence which is the opinion of
the Court is insuff. 1 Root 136 / See also to all this 1 C. 16. 480
L 495.

Pleas and Pleadings

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Rule 314 276 B1 200 2 Sec 256

If a party offering to demur is denied his remedy is by bill of exception 9 Co 136 13a 326 Id 136

Arrest of Judgment

To arrest judgment is to stop stay or prevent it & is usually motion reduced to writing & entered on the record - This proceeding is usually heard only after an issue in fact tried & verdict given (3 B1 386. 393) But a motion in arrest may be made after default suffered or after a demurrer to evidence is determined - On a default the deficiency & not error in the pleadings can be tried for there is no issue - on demurrer to evidence there is no issue in law as to the sufficiency of the pleadings. 3 Burr 900. (Carg 208. 13 the 1271. 2 B1 386) Judgment can be arrested for such causes only as appear on the face of the record intrinsic - Ex. Barlow arises from the writ - or verdict differs materially from the pleadings & issue thereon - the judgment will be arrested for the issue being found rather may the Court cannot give judgment on the verdict - the jury have merely to find the issue - if they find anything the parties have not put in issue the facts in question are not ascertained - Ex. Barlow states that Pett called H a bankrupt - jury find that Pett said H would be a bankrupt. (3 B1 395) Judgment is arrested for defective pleadings - Ex. Barlow discloses no cause of action - H can have no judgment the verdict is for him - So if Barlow is good & Pett has verdict on a plea which discloses no legal defense - Ex. So clerk on whom Pett pleads not guilty - judgment arrested - the issue being immaterial - Barlow if verdict

Arrest of Judgment

After Verdict for motions in arrest for insufficiency of declaration
of Sheriff for Deft. & that Sheriff's return & return remanded to be
proceeded in according to law final judgment must be entered
upon the verdict Day 152.

Pleas and Pleadings

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in this case had been per off deu. 3 Bl 395 Cr 8. 778

I. Genl. rule - After verdict judgt. may be arrested for any cause which might after judgt. be assigned for error (Sabb. 2 Roll 116 -)

If the statement of off title only is defective it is cured by verdict in his favor - deu. if no title or cause of action or a defective one is stated - defect not cured by verdict - Ex. Action of trespass no deu alleged on which it was committed - verdict per off. - defect cured - for trespass enough is laid to entitle off. to a recovery - Ex. Action per calling off or deu - all necessary circumstances of time & place alleged - verdict does not cure the defect - for there is no cause of action. - So in trespass off alleges no prop. (Ante) Query 658 How 202

3 Bl 394. Sed 365. Stra 1022. Cr 832. Carth 389 3 Bl 394 - Contra but not deu Cr 298. 1 Sid 8. 184. Esp 825 -

Some distinctions applicable & converso to off pleadings - 1 - Verdict per off on plea of not guilty to debt or lond - holds out not to be cured - for the issue presented by the plea & found by the jury was immaterial - the defect not being in the statement but in the defense - This rule is a good one to determine what defects are & what are not cured by verdict. 3 Bl 395 18 R 145. 545 D. 472. D. 518 Burr 1728 Carth 389 Cr 878 Cr 649 Sed 365 Bull 320 1. Mod. 292

II. Any defect in pleading which will support an arrest of judgt. must be such as would have been fatal on genl demurrer - but this rule does not hold & converso per many defects which may be reached by genl demurrer are cured by verdict. 4 - Action of trespass extorts off. omits to state the value of the goods &c. in deu. is in genl demurrer but the defect is cured by verdict - for the jury having ascertained the damages are

Arrest of Judgem^t

a am no more 1846 121.

Col. 497
 Earth 302,
 Dev. 308
 456 472
 7. ... 518
 3 Do. ... 25,
 1 Saund 228.,

Deeds and Readings to Jerr 127

presumed to have found the value of the goods - If a party pleads a grant of an adornment without averring it to be by deed - the defect is cured by verdict - defect in the statement & not in the title - the grant is the material thing - the deed is only the mode in which it is made - & if the Jury find the grant they must have found it to have been by deed - for there can be no grant from inheritance of hereditament except by deed - 5 Bar 105. 3 Bl 394 Carth 389. Cr. S. 145. Mult. 54.5 5 Bar 317 10 Mod 301. Cr. 407. 3 Bl 394 2 Will 375.

After verdict the Court will presume all facts, not alleged which are necessarily implied from those which are alleged & found to have been proved to the Jury on trial - i.e. the Court will presume in favor of the verdict every thing which in point of fact is necessary to maintain the finding (Coug 538 15 R 125 1 Will 172. Coups 82. Ray 487. Bulst. 320 Mult. 54. 8 The 1223 Mult 328. Cr. 411 in the paper puts to lay a day certain which is declared - the verdict being found for him who the defect - for the Jury having found the trespass to have been committed it follows that it must have been proved to have been committed on some day & the Court will presume it to have been committed before caption but for evidence of its commission after that time would be inadmissible 3 Bl 394 Carth 130. 389. Sed 662. 130 5 Bar 517. 7 H 518 Burr 2455. Cr. S. 44. 1 The 292 5th 287. 15 R 545 Cr. C. 4971 for some particular time must have been proved & proof of a trespass after suit brought would have been inadmissible (Carth 389) So if he lays a future day - quod verdict not the deed be decided on Carth demonstr 1 decided 118

Arrest of Judgment

15R 145
1. Secum 228 B...

Sd 662

5b5

344b 275

3. B. 394

Said 2 Burr 899 that such omission is good after verdict the
had on demurrer on default 228 B n.

Pleas and Pleadings

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69, 286 Gill C.P. 132 - So if the value of the thing has been omitted
 in the plea of the thing itself. Bun 2455 & Ba 190 67 and also 18R 145
 Bulst. 54 Wilts 261. Inst 303 Lamer 48 & Co 82 C. 1811. Nutt 34 -)
 If the ground of an action is pleaded it is ill in general demurrer
 and if answer to be by deed - but this is aided by verdict - & the same
 has been determined with regard to a plea of release - for there
 may be a grant without a deed the not of an incorporeal
hereditament - 5 Ba 217. Nutt 54 - 2 Wils 376 10 Mod 301 (P 292)
 & if the Jury find a verdict for the party thus pleading the fault
 is cured - for they must have found the grant to have been
 by deed - 5 Ba 217 - Nutt 54 - 2 Wils 376 10 Mod 301 -)
 Nothing can be presumed in support of the verdict except
 those facts which are alleged & found & those which are
 necessarily implied from them - Hence if the title or cause
 of action is defective the defect cannot be aided - & Action for
 calling off a dog - verdict per P. - it avails nothing for
 the words are not actionable - & nothing can be presumed
 to make them so - 18R 145 Pang 558 Bun 1728. 331. 394)
 If any one fact is omitted which is not inferable from facts
stated & proved found & which are essential to the right of action
 the defect is not aided by verdict - for the facts omitted are
 not inferable from those found - & Co. 5 broken off does
 not even performance of a written president in his deed - 11
 3 Bun 1728 Pang 558 4R 100 - P 645 8th 127. P 472 - Bull 320
 1 Wils 72 Sta. 1020 2 W 394 - Led 365 2 W 131574 C 10)
 If in an action against indorsee of a bill of exchange omit
to allege notice - the defect is not aided by verdict in his case
 for the indorsement & non payment are found by Jury yet there

And Arrest of Judg^{mt}

Pleas and Pleadings

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is no presumption that Def^t had notice. Bang 554, 562
B¹¹ 12-

The Court cannot presume any distinct fact omitted in the pleadings merely because that fact is necessary in point of law to support the verdict - for this would be to suppose the lay competent Judges of the Law & upon this supposition every defect would be cured by verdict - Ex. In Op^t. 8th alleges no consideration & on non Op^t. pleads obtains a verdict - this does not in point of fact involve the necessity of a consideration - tho it is true if there be no promise consideration there is no promise which the Law will enforce - in point of fact there may be a promise without a consideration & to this only the finding of the Jury extends 1 Rem. 27. 7 R 351. contra not Law 11 R 103.
A motion in arrest of judgment may be made after a default - it then operates exactly like a quod demurrer - for verdict has never been given for proof exhibited - of course no substantial omissions can be presumed to have been omitted by either supplied by either Bun 900 tho 1271. 11 R 171 -
In some cases judgt will not be arrested for the greatest possible defects even tho nothing is cured by verdict - this is true when the first radical defect is in the pleadings of the party making in arrest - for why should he be allowed to arrest judgt the other party may afterwards amend it against him? This is a consequence of the rule - that judgt is given on the whole record - any plea in law as well as motions in arrest of judgment (unlike) look thro the whole record & attack upon the first radical defect - 11 R 56 109. 99. 8 Co 120 133 10 R 131 1280 4 B & 131 1 Ex declar^y good plea

Arrest of Judgem^t

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frivolous & the replication insufft. if an issue joined and it is found for P^f - P^f cannot arrest judgment - for the first defect was in him 3 Lev 244 Mott 6 of Co 120.3 -

When judgment in peremptory of a verdict is arrested a judgment against the party for whom verdict was found may in some cases be rendered - for if he against whom the issue is found appears on the whole seems to be entitled to judgment - he shall have it said it notwithstanding. This rule is

distinct from the last - If. Declarⁿ is insufft. & plea in bar frivolous on which issue is taken & found for P^f - the will not only arrest judgment but will render it for D^f -

So if declarⁿ is good - plea bad - replication frivolous & verdict for P^f judgment will be arrested & rendered for P^f. Mott 50. 199 8 Co 120.133 Burr 301-6. for judgment must be given -

If issue is taken on an immaterial point it is a common cause for arresting judgment - in this case a repleader must be awarded - If traverse taken leaving what is material ~~uncontested~~ uncontested & settling in issue that which is immaterial - here the court cannot discover how to render judgment -

Apt against an Ex^r for the debt of his testator - P^f pleads that he did not assume & obtains a verdict - but his testator might have promised - the issue is immaterial - judgment arrested & a repleader awarded 2 Vent 196 2181 395 Brun 994 Hra 994 2 Saund 219 R. 298 Cr. 1434. Cr. 2 245 - Same, 175 P. R 707 4 B & 126 - Burr 301.5 -

Suppose in an action against husband & wife for a trespass committed by wife when sole - P^f plead

Repleader

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Pleas and Pleadings

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They were not guilty & the Jy find they are not guilty must be arrested & a replender awarded - for the issue is immaterial

Ex 9.5 Lawes 176 43a 127

But suppose the declaration good - Plea in law insufft & Pff traverses a part of the Plea & obtains verdict - no replender would be awarded nor just. arrested - for no

manner of joining issue would avail Caffe Reg 458 D K 707. 2 Vent 196 2 Saund 319 Bun 301. 2130 8 Co 120 133 Hob. 56 198 Hwa. 994 Sol 579 173 216 Camp 510 3 Kel 664

A replender will never be awarded for an immovable defect Bun 2030 Hwa 394 8 Co 12023 -

Judgt. of Court is a conclusion of law from facts ascertained on record - hence called sentence of law -

Repleaders

A replender is awarded to give the parties an opportunity of pleading over again - Ex Reg in law laid & Pff traverses an immaterial part of it - a replender will be awarded in order to enable him to traverse a material part - the pleadings begin de novo at that stage at which the first objection from the rules of pleading occurs 3 B1 395 1 Hwa 2 Sol 579 175 - 216 Camp 510 Reg 458

A replender for the immateriality of the issue it seems is never awarded in favor of that party who traverses multiplicity of the verdict be against him - if the verdict be in his favor the other party may have a replender Caffe 380 Saund 308 1 Saund 319 Camp 510 - 1 Hwa 644 Sidea 824

Judgt. may be arrested for an immaterial issue - but an issue

Repleader

Where the finding upon an issue does not determine
the right a repleader will be awarded unless it appears
from the whole record that the matter set up could
not have been pleaded in any manner so as to have avoided
1 Burr 201 2 L.R. 924 6 Howl. 434

A repleader will not be granted except where
complete justice cannot be answered without it
22 Co. 374 10 W. 510

Pleas and Pleadings 462

may be material & decisive if decided one way. When it must be immaterial if found the other. Ex. Pleas on bond for payment before the day on which the bond was payable. Verdict before and against him it would be upon an immaterial issue & a replender would be awarded. See also if found for him Burr 944. 2 Wils. 173 3 B. 1395. 4 Babb.

A replender can only be awarded after an issue in fact - & never after a judgt. on demurrer - for say the books the parties have put themselves upon the Court - but the reason is it is an issue in law which reaches thro' the whole record & can never be immaterial for the Court are to give judgt. for that party who upon the whole pleadings appears entitled to it 5 Co 52 Rep. 42. Fatch 118 6 Mod 102 contra 203 See 20. 440

When a replender is awarded when it ought not to be or refused when it ought to be granted. judgt. is erroneous. See 571. 6 Mod 24. (Day) There can be no replender after default or discontinuance - for P^r does not wish for it & P^r is not entitled to it as he either has not pleaded at all or has abandoned his defence - after discontinuance the party is out of Court & in neither case is there any issue on which judgt. is required. Comd 322. See 579. 6 Mod 3. 4 B. 124. A replender is awarded in those cases only where the Court does not know what judgt. to render on the issue - id. C. 1. - it was sometimes awarded before trial but since the H. of C. fails it is not usually done - for under those Hs. many defects are aided by verdict & the Court will not generally determine beforehand what will be aided & what will not - However when a defect is clearly incurable the court may award a replender before trial See 32 1 B. 90

Repleader.

Pleas and Pleadings

1795-1800 463

100. 2 Rob. 554. 1100 2 Carth 371 1005 79 Kirby 1014

A refleader is never awarded on a verdict of error for in that case
final judgment has been rendered & the object of a refleader is to lay
the foundation of a final judgment. 2 Saunders 319. 2 Lev. 12 6 Mod 102

Refleaders are awarded for some defect in the issue tho the verdict is
right & follows the issue - when the issue is right judgment may be
awarded for defects in the verdict - in this case the Court will
award a venue de novo - but in French verdict the Jury find
only evidence of necessary facts & not the facts themselves
judgment will be awarded & a venue de novo awarded for the Court
can perceive nothing on a French demurrer since it is not
their province but of counsel that of the Jury to infer facts
from evidence - Ex. In French Jury find that the property was
bailed to Post who on demand refused to deliver them to Off.
now a refusal & demand is not a concession but mere
evidence of one - Court cannot give judgment for a concession
but must award a venue de novo Russ 1243 2 P. 421. 590 1 East
111. 100 50. Cr. & 103 5 Leon 82 - 1100 65. P. R. 1521. Sta 844-1089 -)

If however the substance or material part of the issue is found
the verdict will be sufficient tho an immaterial part is omitted
13 Mod 22. 2 Vent. 27. 12 Mod 5 -)

If the verdict varies materially from the issue it is ill &
judgment will be awarded - Ex. Action against Ex - on a plea
that testator did not assent & promise - Jury find Post did
did not assent & promise - judgment will be awarded - In all cases
when the defect is in the verdict & not in the issue a venue de
novo & not a refleader will be awarded. 2 Vent. 15. 2 Roll 707. 19
5 Ba. 209

8 Repleader.

Verdicts and Pleadings - 464

A verdict which finds the issue & also more than is put in issue is not initiated by the surplusage - Ex. Action against Ex^{rs} - the question is whether he has assets - the Jury find he has assets legend sears - verdict is good - Ex. 1407. 6 Co 57. 2 Roll. 714. 5 Ba 297. 699

If the Jury after finding a fact specifically make a conclusion of their own the Court are not bound by the conclusion but will give judgment without any reference to it on the facts found - as on a question of title the Jury find a lease to J. S. & thus J. S. was raised in fee - 11 Co 10 5 Ba 285 Mod 53. b Dy. 362

If in a civil action there are two counts one of which is good & the other bad & the Jury find a general verdict & entire damages judgment will be entered & a writ of deceit awarded - for on the count which is ill. It has no right to a verdict & the Court cannot know the amount of damages given on the good count or whether all was not given on the good one - nor can this be ascertained by enquiry of the Jury because the foundation of the judgment is the verdict itself - 10 Co 130 Bull 8 2 Bar. 2 Wils 377. 18 R 32. 508 there 1094 2 H Bl. 318. 1 Bos 329 Ex. 528 Roll 377. 609 362 Mod 346. 433 Ex 8328. 88

Yet where there are two counts one good & the other bad the damages will be suff^t on damages & it has been given as a rule that every defect which will support a motion in arrest must be such as would have supported a demurrer - but that rule contemplates a defect in the pleadings - here judgment is entered for assessment of entire damages - but in such case if several damages are assessed on each count It may release there on the last count & take judgment for the residue - 3 Ba 568 11 Mod 271. 12 Mo 13 - 1456

Repleader.

Deas and Readings

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(When several damages are pressed against several Defts is a ground for arresting judgt vide 2 Bar 291 321 420 11 Co 67 10 Cuth 19 Bun 2790
see also a release necessary? -)

So if in such case entire damages were given yet if no evidence was adduced in support of the bad count the verdict may be corrected from the Jury's notes so as to apply to the good count only. Stee 513. 1 Dev. 134 10 Cuth 362 8 R 564. vid 1 Root 333. 46 per a principle out of use now -)

Upon a criminal prosecution containing two counts one of which is good & the other bad & verdict against Def't. judgt will not be arrested - for one count is good & Def't. ought to be punished - & as it is for the Court to pronounce sentence there can of course be no danger that Def't. will be punished on the bad count. Bun 955 10 Cuth 384 10 Cuth 703 8 R 886 - 2 Saunders 627.)

At C.L. judgt. is arrested only for intrinsecus causes but in Ct. it is arrested for many extrinsic causes - in substance the same as the Eng. practice - for these causes originally extrinsic are bro't upon the record & then made the foundation of motions in arrest - 5 Bar 291. Stee 642 1 Vent. 125 - 1 Inst 227 -)

In Ct. judgt. may be arrested for any misconduct of the Jury - as if they should give the opinion of any person relative to the verdict they ought to give - or refer themselves to chance - or for any misbehaviour of the jurors to worsen the Jury - as being with or tampering with them judgt. will be arrested. Prisy 13. 138 84. 5 Bar 291. Stee 642 1 Vent. 125 - 1 Inst 227.)

Many Jury is interested or so nearly related to the prosecuting party as to found a prima facie challenge - or was so nearly related to the trial of the prosecuting party as to

Repleader

In Ct. the juror must be a freeholder - Lewis a good
cause of arrest. But judic^t will not be arrested
merely because the jury separated after the
cause was committed to them & before they
had agreed on a verdict - 1 Ct. 640 - n.

Deas and Readings 466

render him incompetent to try a cause for him - or that he has before been substituted or attly or has given an opinion in the same cause is good ground for arresting judgt (Rily 1bb. 184 279)

Genl. rule that any incompetency in a Juror that goes to his impartiality & movable cause of a principled challenge is a good cause of arrest less if the incompetency raises no presumption of partiality. (Rily 13. 133.) Also the incompetency goes to the impartiality of the Juror yet if the party knows of it in season & omitted to challenge he cannot arrest judgt - reason - policy - (2 Lev 232. Rily 156.) A previous opinion declared by a Juror on a principle of law which is involved in the case is no cause of challenge or arrest of judgt Rily 42b

- A previous opinion on the merits of the case by a Juror if it appears not to have influenced his verdict is no ground of arrest - If the verdict is contrary to the opinion expressed I think the rule a good one - otherwise it may be of dangerous consequence - the usual course in these cases is for the Court to enquire of the Jury - 2 Lev 232 Rily 62

On a motion in arrest the Court can never go into the evidence on which the verdict was founded - A motion in arrest stating that the Jury have found a verdict against evidence is lost - (Rily 118 142 273.) 2 Lev 264 - said by Swift that an arrest of judgt for misbehaviour of Jurors or parties a repleader is awarded - not law - a venire de novo must issue - 2 Lev 264

The large causes, not originally appearing on the face of the record - either in pleading - verdict - misbehaviour of Jurors or parties

Repleader

Pleas and Pleadings

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The fact which constitutes the objection is entered on the record by the Judge who takes the verdict & thus becomes a record of the record & lays the foundation of a motion in arrest - In Ct. such cause may be presented by motion in writing found on evidence of the Court - In Eng. the Judge goes into the inquiry & if convinced of the truth of the fact states such on the record - In Ct. it is entered on the record by the finding of the Court - The Eng. practice is more loose - I find two cases, where this has been adopted as practice - The usual course both here & in Eng. is to obtain a new trial in these cases - 5 Br 288. 91. Sta 642 - 2 Ser 205 - 18 R 79. Benley 31)

An arrest of judgment for defects in pleading no writs are regularly allowed to either party - for the party asserting judgment ought to have demurred in the beginning - 1 Ser 379 2 Kent. 196 18 R 267. Sta 617 1 Root 69. 512 1 Ch 68. 89. 838 Corp 407 - So if motion in arrest is overruled & the party moving brings error & prevails - he cannot move writs below & he never recovers writ in error 1 Green 79 - ; This rule as to non allowance of writ does not apply when judgment is awarded for defendant's cause but a verdict de nono must be awarded & regularly the whole writ follows suit - for the party moving in arrest could not have taken advantage earlier - 1 Root 47. 572)

In Eng. motion in arrest are made within the first four days of the next term (3 Br 395 - for the form. 3 Br 411. No 2 -) In our practice the motion must be made within 24. hours after verdict found - Prail 225 - 1 Root 572

Def^t can move more per judg^t more obstante his
remedy is by notice in arrest 4 Mand^t 468 5 do 574

On a hearing in damages def^t may contradict by Aff
witnesses that have been testified on the direct examination
but cannot establish by any testimony or evidence to defeat
the Aff right of recovery 5 Mand^t 563.

If a plea is laid in substance Aff shall have judgment
non obstante 11/2 Lohr 230 1/2 do 20 3 Mand
330 1 Rem. 301 Fed q^r unless some one pleads
on the record upon the cause of action or unless
one of many immaterials are found by the Jury
/ 23 C 2 373. 381 / for the Plaintiff.

On a default & hearing in depositions evidence
concerning the cause of action or showing that some
facts is inadmissible - the default admits the
cause of action set up in the declaration

1 Dec 612 1 Dec 508 10 March 378 - left may
examine off witnesses to controvert the evidence given
to sustain the action but not to show a substantive
defense otherwise 1st Hill 101 5th March 563 answered &
1 March 780 overruled

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Handwritten text, likely bleed-through from the reverse side of the page. The script is cursive and appears to be from the 18th or 19th century. The text is mostly illegible due to fading and bleed-through.

Bills of Exceptions

Nov 4th 1868

A bill of exceptions is a statement of facts (of some interlocutory judgment founded upon them) annexed to the record for the purpose of laying the foundation for a writ of error. The statement consists of facts not originally appearing upon the record but which are the foundation of some interlocutory judgment which the party against whom he thinks to be erroneous. It is called a bill of exceptions because it contains exceptions to the interlocutory judgment. 3 Bl 373. 1 Bos. 324-4-136. q 60-13

This mode of founding error was unknown at l. - introduced into Eng- by Stat. Westm (1 Rob. 324) We have no stat. on the subject but have adopted the Eng. law. Rily. 108.

A bill of exceptions being to found a writ of error cannot be taken except in a court from which a writ of error lies. Ex. Courts not of record in Eng- Courts of Probate here not before commissioners here Bull. 316. 1 Bos. 327.

One case in which a bill may be taken supra viz- overruling an offer to admit to evidence (4 Bos. 136. 1 Bos. 326. q 60-13. Cro. 6-249. n 341- So in Eng- for misdirection of the Judge 1 Bos. 564 2 Bl. 31. 288-2 N. R. 1.

If evidence objected to is admitted - or rejected a bill of exceptions may be filed. 1 Bos. 326. 2 Lev. 237. 76. Rily. 168 Bull 316 This is also a ground for a new trial. 1 Bos. 326 - But if the Judge admits the party's evidence bill not allowed because he did not direct the jury how to find upon it (Bull 316. 3 May. 1105) as to find in favor of a record which is conclusive 1 Bos. 326 3 Caines 168 8 John. 4 295

Jury is refused when in the opinion of the party it ought to be granted - or ordered when it ought not to be

Bill of 4. ought to be on some point of law arising from a fact not
admitted in which either party is overruled by the Court. 2d. 1/68
17 Johns 218 10 Oct 75. 156

A Bill, does not lie to the charge of a charge for misdirection as to a
matter of fact. the proper remedy is to apply for a new trial. 9 Ct. Sup. 8

22 Day 364

Bills of Exceptions

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bill of exceptions may be taken - So in case of allowing or overruling challenges of jurors. 1 Ba 325 - 2 Inst 227. Dy. 231. 3 Parg. 486.

But on an interlocutory judgment relating to mere practice bill of exceptions cannot be filed - Ex ordering or refusing to order bonds to prosecute de - So when the decision of any kind is discretionary with the court. Ex. Granting new trials - (Rely 41) imposing terms on granting them de - of these error is not predicable - so bill of exceptions improper - Bull. 316 - 1 Ba 327. Inst 290. Suppose new trial in a case in which or by a court by which it is not by law grantable - Ex. 134 Justice of the peace.

It may be taken in all courts where judgments are liable to be reversed in error. 1 Ba 326 - Ex B. R. in l. 2. 2 Inst. 117. 2 Lev. 237. Shewen 386. 2 Shaw 117. 287. Bull. 316 - Some cases contra as to B. R. the proceedings here are concern rege - In l. it may be taken in Sup^r. County & Justice courts - Some doubt as to Justice courts - Why? Rely 289.

They are not allowed in prosecutions for treason or felony, for the Judges are counsel for the prisoner & must see that Justice is done him (an extraordinary reason when the bill is always founded upon a supposed mistake of the court) 84 1 Lev 68 - 1 Keb. 324. 3 Parg. 486 Rely 15 - 1 Ba - 326 - M. N. 325 3^d per Pais. 201 Such cases not within the 4th section 2 - "frivolous exceptions" - True reason there cannot be a second trial.

Whether allowed on indictments de for offences not capital gu - 1 Ba 325 - 2 Hawk. 248 1 Leon. 5. 1 Kent 366. Bull. 316 - 1 Lev. 68 - Rely 15 Rely 269. 1 M. N. 326 -

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enlarged paper

a party taking an exception to admission of evidence
must state the ground of his exception or the Judge
will be justified in disregarding them 20 Solms 362

8 Solms 495

Bills of Exceptions

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In Eng^d it has been allowed on an indictment for trespass 1 Leon 5
1 Bea 325

Regularly when a bill of exceptions is allowed in Et. the
court will not suffer the party to move in arrest of judgment on
the point on which the bill was allowed - having once given
their opinion & the party's remedy is by writ of error 13 Ce 327
2 Lev 237. 2 Jon. 117. West 266 This rule sometimes dispensed with
in B.N. Bull. 316

The object of the bill being to draw before a higher
court a judgment on some collateral point - it is regularly not
allowed to embrace the general merits of the question - cause
that is - to draw the whole controversy into a further examina-
tion - A bill of exceptions made after judgment and containing
a general statement of the facts & arguments is inadmissible
the sometimes practiced (Bull. 316 1 Will. 8. 466 2 Sw. 276 83 R.
549. Camp 161. 1312. 555) & if the court below allow it the
Court above in Et. will abate the writ of error 11 R. 399.
456-77. 1312. 555 - Camp. 161 10 Et 75. 156

The bill is authenticated by the
signature of the Judges or of one Judge in Eng^d (1 Bea 325)
who appears in the court above & acknowledges his
seal 1 Bea. 32. Camp 161 -

The bill must contain a statement
of the interlocutory judgment & of the facts on which it was
founded - If the facts are truly stated the Judges are bound
to certify - that is - sign it - otherwise not 13 Ce 326 Bull 316
& if the Judges refuse to sign a writ another sign must
on the 6th West^m 2 - commanding them to sign it 13 Ce 326 -

Form of a Bill.

unimproved paper

6612A 279

[Faint, mostly illegible handwritten text, likely bleed-through from the reverse side of the page. The text appears to be a draft or a copy of a bill, with various lines of script visible across the page.]

Bills of Exceptions

471

2 Lec 237. Shaw-116 Bull. 316 - qu Does this writ lie in Cts? In Cts it is certified by the Chief Justice or presiding Justice -

In Eng^d the bill must be tentured or at least the substance of it reduced to writing at the trial Bull 315. Sah. 288. Holt 308. - In Cts the party must give notice of his intention to file one (Root 569) or move to file one when the cause of exception occurs - & the bill must be filed when within 24 hours after verdict recorded when the trial is by Jury, & within 24 hours after judgment when the trial is by the court - always before the court rises - 2 Sw. 276 - Root 569. In computing the 24 hours Sunday is excluded -

The common practice here is to state not only the interlocutory judgments & the simple facts but also the grounds of objection &c. which were taken at the trial. - A bill of exceptions is not a superseder of the judgment but merely enables the party to obtain a superseder by writ of error. 1 Ba 327. 12 Mod - 609.

Form of a Bill. L. County, ss. "Bill of exceptions. And the citation of Plea of - on the trial of D^r cause the Aff^r. H^r offered in evidence &c. - O'eff^r objected (stating the grounds &c.) Court decided in favor of Aff^r. H^r & now O'eff^r excepts &c. - & prays ^{the} judgment to certify &c. -

This becomes part of the record & lays the foundation of a writ of error. In Eng^d it is no part of the record in the court below 1 Bos - 32 -

§ 177 in Aft. does not state for what cause the debt or duty
on a writ of error lies. See Aft.

A writ of error must be bred in the names of all
the parties agt. whom judgt. is given & if one be dead
he must be named & his death suggested in the writ
Palm 152 b. Co. 25. Cro E. 648 b. q. Yelton 11 Cro E. 892
Barth 1. 8. 3b. 3 Mod 134 5^d. 1b. b. q. 8^d. 305 31b. 2^d R
71. 328 1103 1532 870 1 Sal 312. 313 Shea 233. 234
60b Hardw. 135 1103 88 Burr 1392 2 Saund. 101 f. / & a
writ bred by one of several Writs may be quashed
Barth 8 S R 71

Where there are several Afts in error a release of one of
them shall not bar the others b. Co. 25 Cro E. 648 Cro J. 11b
310b 135 2 Saund. 101 t. n.

Where several become privies by interest in a judgt.
or property affected by it having several & distinct
interests each may sue out a writ of error
Notwithstanding a release by the others. 10 Mod 68
Porter v. Rumney 3 Roll 422. Barrow 1461 Lord Hardw.
5 B. 7. Cro J. 110 138 5 Co 111 Cro E. 225. 558.

Writ of Error

472

A writ of Error is a commission to Judges of a higher court to examine the record on which judgment was given in the court below & to affirm or reverse it according to law. 2 Ba. 187. 3 Bl. 407. Senk 25-2 Inst. 403. 2 Inst. 209. In Eng^l the writ of error does not summon the Party in error to appear for. He is summoned by *sci. fac. ad audiendum errorem*. 2 Ba. 207. 10 3 Bl. 447. See in Et. 2 Bro. 276.

When founded on a mistake of the court below it is not for the reversal of such judgment only as is rendered on some point of law appearing on the face of the record. (2 Ba. 189. 3 Bl. 407. 5 Leon. 286. 1 Roll. 746. Cro. E. 233. Cro. 142. Dig. 35. 1 Leon. 233.) not to traverse an error in the determination of facts.

By the term writ of error without more is regularly meant error of the above description - that is one founded upon an error apparent on the record. 2 Ba. 187. 3 Bl. 407.

If on the writ the Plaintiff in error can recover or be restored to any thing in the nature of debt or damages, or any thing real or bond it is considered as an action & a release of all actions will bar it - unless if it be to recover only a judgment reversed & cost incurred below. Cro. E. 288. 2 Ba. 187. 225. 8 Co. 152. 1 Roll. 788. 2-1105.

There is a species of writ of error founded on matters of fact below the record this kind of writ of Error is possible of being granted of fact not to others as the Exchequer Chamber. Cro. E. 5. Vent 207. 2 Dec 34. 2 Ba. 215 for it may be brought in the court in which the judgment was rendered & then it is called a writ *sc. cor. nob. Et. Inst. 22* as a false count below - as an infant without his (3 Ba. 15). Cro. E. 112-119. Cro. E. 5. Kirby 114-3 Ba. 151.) Having appeared by *Guarandum* 3 Ba. 100.

Assigning Error

An assignment of errors in fact must conclude with a verification Burr 410 Smith 367 2 Sourd 101. / post 475

Error will not lie in an error of judgment 2 Johns C 215.
But where verdict is given for plaintiff judgment of error will
may move for judgment against himself in ascertaining
a writ of error. 2 Johns R 101 god. bid.

A writ of error will not lie to a judgment of the circuit
court granting or refusing a motion to amend Darr 4
Craig 9 Wheat 576 - post 479 5 Ct 425

A writ of error cannot be sustained except in those cases
where the matter assigned for error have been actually
considered by the court below or were so presented that
they might have been presented upon 11 Mass 179 2 Id 137
12 Johns 269 13 do 561 17 do 467 3 Mass 667 - even tho,
all the evidence adduced on the trial is set forth in the bill of
exceptions the court will not review any matter not specifically stated
as a ground of exception 1 Mass 421

2 Roll. R. 53. 5 Com. 177. Vent. 209. 5 Com. 300. 286 4 Ba. 29. 22. 198. 277
 228 Carth. 367. Yelut. 58. Cr. S. 10 | So if Aff. or Deft. is dead when just-
 is rendered (4 Ba. 143. May 59. 5 Com. 286 Hilb. 282 Carth. 338. 2 Ba.
 218.) So if the Judge who gave the just. was interested in the cause
 (5 Com. 177. Stra. 639.) So if one who sees & recovers as Ex. of J.S.
 J.S. being alive. Semb. 38 R. 129. | Compare with 5 Com. 289 1 Roll. 744

A writ of Error will not lie on any just. of a Court not of
 record in Eng. as C. Baron - on a decree or sentence of Chz.
 for this is not a court of record - but on a just. given in
 the Petty-Bag office in Chz. it does in B.R. for this
 court proceeds according to C. L. & is a court of record -

3 Ba. 28 22. 194 1 Roll. 714. Dy. 315. Moe 570 Col. 288. 5 Com.
 289. Bull. 235. - | But on a just. of nonsuit it will
 lie - Dy. 322. Stra. 288 1 Roll. 714 14 B. 1432 -

See Et. Error lies
 by Stat. 162. on a decree or sentence of Chz. as on a
 just. rendered by law -

Upigning errors in law & fact
 together is ill in Eng. because they require different trials
 - matters of fact should be tried by a jury - matters of law
 by the Court. 2 Ba. 217 Yelut. 58 Ric. 93 May 59. 5 Com.
 300 1 Roll. 761. 1 Sid. 187. Leon. 105 May 320 Vent. 252.

The
 matter of fact & law are blended in the writ of error
 yet if Deft. in error plead in nullo estenatum in recordo
 he loses the advantage of the double assignment & generally
 unless the error in fact 2 Ba. 218. 209. Carth. 338 1 Vent. 252

Assigning Error.

John R. 189
Ba 883
Hear 439
2 Saund 1013-1

Rule, After 'sett' in error has place in nulls et. action
no demurrer can be alleged / Cro & 84 Moor 900 1 Saund 22/
for this plea admits the record to be perfect & no one may
contradict his own admission / Ba & B 58 na 1 Sal 269 / 2 Ba 217
Also the admission of parties cannot restrain the Court 2 Ba 883
from looking into the record 1 Sal 270. 269 Hear 440 Hce 439
1 Roll 764 1 Ba 1005 Warder 118 2 Ba 205 2 Saund 1013-1

Ba 45
2 Ba 217
2 Ba 883
Hce 439

A error in fact be not well assigned 'in nulls et.' does not confess
it a mere demurrer - Ex. assigning a fact that contradicts the record
yelt 58 1 Saund 309 1 Bigh 415 22 Ed 98

Ba 410
22 Ed - 98

* In these cases in nulls et. has the effect of a demurrer
where an estoppel appears upon the record 1 Vent 252
1 Hce 684 of 11th Ba

Neither can anything be assigned for error that was for the admission
of the party assigning / 2 Ba 220 Hce 382 2 Co 59. B. 39 for that is Hce 684
aided by appearance / 1 Roll 789 Cro & 582 / or by not taking Hce 1414
advantage of it in due time 1 Roll 82 2 Ba 221 2 H. B.
269 299 South 124 2 Saund 1013-1

Hce 684
Hce 1414
Hce 85
2 Ba 217
Hce 218
Hce 310

A party may assign for error an error in his own
favor if it be a default of the Court 6 John. 101 na
2 Hce 126 2 Ba 1191

2175 na

Pits of Error

474

1 Ler. 6 Sel 208 called 113 206 - In such case the Def-
should demean - It is said a good demean would reach
the defect tho the defect is called duplicity - not within
H. 27 Eliz - 23 Br 218 6 Cuth 338 13 Cr 95 - demean must be special
7 Mand 55 The assigning
several errors in fact amounts to duplicity - but the assigning
several errors in law does not 5 Com 300 2 N. B 20. 3 B. 15

If an
error in fact be well assigned it should be traversed - in
"nullo est erratum" confesses it - but if it be ill assigned
this plea does not waive it (Yebot. 5). Ray 59. 231 Er. 12
29 529 1 Roll 158 2 Ler 277. 2 Ba 218 1 Com 300 Sid 98 /
It was decided by our S. C. that assigning with sufficient
errors in law errors in fact not assignable does not
vitiolate the writ - this was on special demean / Trial. 27. 30
In another case a plea in abatement on the blending
of errors in fact & law the same court overruled this
error in fact to be struck out & reversed for the others
1 Root. 262. 2 Ler. 277.

An assignment of errors which
contradicts the record is not good - as that the court did
not sit on the day of the date of the judgment or that
the P^l. in error did not appear when his appearance
is entered on the record. / Cro E 12. 489. 6. 105 68 Kirby 154
Hob. 204 1 Roll 162 Dy. 89 Ray 231 5 Com 301 Salk 262
2 Ba 218 - In none of these cases does the plea "in nullo de x"
where error in fact is assigned the proper conclusion
of the assignment is with an assentment "hoc peractum" de

1817 26111
C. ick into this 1 Benc 410 2 Benc 382 -

A No person can bring a writ of error unless
he is party or privy to the record or is prejudiced
by the judgment / 2 Benc 46 n.b. 1 Roll 747 Dy 90a 2 Benc
195 1 Benc 261. 2 Benc 68 1 Sal 295. / But if there be
(judg^t ag^t the principal & also ag^t the bail the one
cannot have error on the judg^t ag^t the other -
nor can they join - several judg^t & affect distinct persons
2 Benc 117 n.b. 1 Roll 748 749 Cro E 408 561 481 Jones 396
1 Benc 137

B If an error in fact be well assign^d & not in error
ought to deny it & join issue for if he pleads in nulli-
ty or evasions he confesses it. / 1 Roll 763 Dy. 155 1 Ray 231
1 Benc 204 / But if he intends to controvert the fact or
alleges & deny its legal efficacy he ought to plead in quod
de / 1 Roll 763 2 Benc 101. 8 n.b. / ^{Warrant} ~~that~~ is assign^d for error
which is not assign^d or be ill assign^d & that the Court May. 27
did not sit in in nullity is no confession but shall
be taken for a demurrer only / 1 Ray 231 1 Benc 311
Cro E 521 1 Roll 758 Cro E 665 1 Benc 114 15 2 Benc 218 -
2 474 1 Mand 56 Ba. Error K 2

Writ of Error

1 Com 308 | That the conclusion should be to the contrary
see. Yelet 58. 2 Ba 218) 1 Ba 112 Baith 369 - C

But generally

if the error is in law error crimen iuris does not
lie - 2 Ba 205 - 5 Com 286 1 Her 149 11 Mod 186
1 Sid 208 - | Exceptions - when occasioned by the clerk
of the court or sheriff or other officers of the court
(Noll 746 4 N. B. 21 -) then error crimen iuris lies
for errors in law since in those cases the error
does not proceed from any fault or mistake in the
court - seems if it was the fault of the Court - 5 Com
286 1 Noll 746 11 Mod 186

1) if the error is in the process,
error crimen iuris lies because this is not an error in
the judgment. | 1 N. B. 21 Popk 181 1 Noll 748 3 Bl 279. 2 Ba 215
5 Com 286 — | The old rule was that a writ of error
the brot on an interlocutory judgment would not issue till
final judgment because the party might prevail after
interlocutory judgment against him - 1 Noll 749. 1 Inst in
Eng - it seems the teste may be before final judgment the
the return must be after award. 3 Bl 308 2 Arch 133
1 Side 100. 4 Co 1 171 280. 2 Bl 199 1 Baith 255 -

In vt. the old

rule prevails & our courts have decided that an agreement
with the parties to dispense with final judgment shall
not supersede the rule Root 181. 290 1 Day 27.

Final judgment cannot
be waived & a writ of error brot on an interlocutory

Rule. A judgment being an entire thing cannot be reversed in part
 & affirmed in part. 1 Bul 24 2 BR 825. 255 Cuth 235 2 Bx 2 Scaud 101.
 227. 228 Bro 1/24/ So where there are dependent judgments of the same Court - 78
 if one is reversed the others must fail. 2 Bx 229 / See also if Bro 8 - 892
 the dependent one only is reversed 1 Roll 776 5 Co
 Sta 1058 11 Mod 345 2 Scaud 101 n. 11 - So if the judgments b. Mod - 40
 are distinct & independent or consist of distinct & independent parts. Sta - 234 -
 may be reversed in part as 1 Roll 124 See also / Sta 188 2 Bx 893
 1532 1534 Sta 808 4 Bx 2018.

2. Despot against two - one foreigner - will of error in the
 name of both & otherwise by striking out the name of the Def.
 who was given below, Camp 423. b. in 2 Sta 892. Thus comes
 at 5 Geo 1.

It is not even that a writ is not immediately recorded - a
 memorandum sh^d be made of it & the record completed at
 some subsequent time 22 L. 2. 97

Sta. 1110

2 Scaud 101.

Misdeeds of Error

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judgt either in Ct or Eng^d I suppose — It is a general rule in Eng^d that when a judgt is joint against several, all must join in a writ of error & if some refuse there must be a summons & reversal because an entire judgment must be reversed in toto or not at all — Tho if the judgment is separate it may be reversed in part — Chatter 265 11 All 747 5 Com 290 4 Ann 2022 Prinly 116 23 Car 198 Sti. 407 2 All 134 1 Tha 189 808 — except as to cost & affirmed as to the rest — So according to our decision if the judgt is severable — Ex Errorous as to part of the costs — or where there should be no more cost than damages — Root 138 — B.

But where part of the Defts were infants our courts have reversed the judgt as to them & affirmed it as to the rest Prinly 116 23 Car 198 Roll 76 Eng 189 2 Aff 11

No person can bring a writ of error except parties or privies to the first judgt. — & the same rule applies as to Defts in error 1 Roll 748 55 — Lia 317 L. N. B. 107 2 Sic 56 Leam 201 23 A 355 5 Com 291 23 Car 195 — C

Genl rule that no one single party can ~~reverse~~ reverse a judgt unless to his disadvantage therefore if one of several Defts obtains judgt he cannot join in a writ of error to reverse a judgt-reverses against the others — they alone must bring it 5 Co 39 85 59 1 Tha 892 1 Le 210 23 Car 195 220 Roll 21 Roll 70 Sti. 190 6 Aff 415

One shall not have error unless he can show that
 the error is to his disadvantage / 2 Sourd 46 27 560
 39 Sourd 970 S. R. B. 21. 92 - / Said that if the error
 be in the just - Roll it may be assigned tho for the
 advantage of the party assigning 2 Sourd 46 47 arg^o
 860 59. 4 Day 145 / So said if the error be by
 fault of the best it may be assign^d by him who
 is benefited by it 2 Sourd 47 n^o 8 Roll 759 760
 4 Sourd 61 / Said if the fault be in the verdict - Roll
 760 2 Sourd 47 n^o 8.

Off. may assign for error want of Jurisdiction of the
 Court in a suit instituted by himself 2. bounds 126. 1 Peter
 Court R 370.

Suppose improper testimony is admitted to prove a fact otherwise
 sufficiently proved in it case. 6 Bouds 222 3 sty^d said not -
 on 16th Nov 89

Writs of Error

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Exceptions to this rule - When the error is the fault of the Court & where it alters the nature of judgment - Ex. - Omitting to remove the party against whom the judgment is rendered when he ought to be removed - So if on a judgment giving damages & costs & judgment is reversed for damages only &c. In these cases the judgment is in itself defective & incomplete. 2 Bos 220 & Co 59 14 All 751 Cro. J. 211

Rule in Ct. Where on reversal App. wants entry in S. C. for trial he must accept the same term in which judgment in error is rendered - A writ of Error in S. C. must be brought in the same county where the original judgment was rendered Regt 55. 259 Re. Ct. it has been decided that two judgments of a like kind & depending on similar principles may be joined in a writ of error - Ex. Two writs are notes of hand Baily 160.

Sup. By our practice a writ of error must be signed by a Judge of the court to which it is returnable. 2 S. 279. - On writ till record if the copies differ the the court will order the original record to be brought up. Regt 88.

Supersedeas In Eng. it seems to have been formerly holden that showing a writ of error to the Court is merely operated as a supersedeas till 21 days have expired in which time the party was allowed to obtain from the Clerk of error an allowance of it - but now it seems to be no supersedeas until its allowance - Bennis 376.

If there be no stay of 24th or 24th is lapses a writ of error is not
 Supremacy of law 1817 1818 9th Edition 1818 17 do 24

Barnes 196
 197
 Stra 632
 731
 2d R. 121

The C. will not stay proceedings in an action on a
 judgment pending a writ of error to reverse that judgment.
 not withstanding if swears the writ of error is not for
 delay / 3 R. 76 2d. 78. 79 3d. 648. 79 / See if the parties
 confess the writ of error is not for delay 3 R. 79.
 848 4 R. 496 5. 669 714 2d. 101 h.

Where there is a misnomer in the off throughout the action
 the judge in his final judgment is in error 1 R. 455.

Writs of Error

No. 278

1 Ben. 478 1 Roll 492, 23 Am 210 2 Del. 129 1 Vent 235
12 M 280-

But the allowance is a supersedeas for 4 days
after judgment signed - the time allowed for putting in
bond - If bond is then put in the supersedeas continues
otherwise not. 10 M 280-

In Eng^d the bond is
with two sureties double the amount of the judgment -
3 Sec. 1 - 2 13 & 16. Car. 1 - 1 Ben 312. 12 M 672. 3 - bro &

Here if a sufficient

bond is given the writ of error is a supersedeas of the ex^m
from the time of return - otherwise not - This bond is to
secure all damages cost &c to all which the bondsmen
may be liable. C. L. 1806 Phillips & Scudlon - 1 Wils 98
the Neeve - suppose the writ of error goes without bond
- quod hoc - This rule relates to ex^m. not executed

Ex^m. or
Adm^s when ~~it~~ in error may in Eng^d have a supersedeas
on writ of error without bond. bro & 350 not within St. 3
12 M 21 Ben 672-

The writ of error becomes a supersedeas
of the ex^m in the officer's hands on leaving a copy with him
In Ct. there is no rule as to the time of pleading in
abatement of writs of error - it is admitted within the
time allowed for pleading other pleas, 12 M 289

If one
writ of error abates or is discontinued by default of Pff -
in error a second one is no discontinuance supersedeas -

A writ of error may abate by act of parties, Ex. Brd, by
some rule who afterwards occurs, but 50th in error
with leave of court may take out ex. Reg. form & leave
court leave but a decree writ / 1800 1015 / But
bankruptcy is no abatement of a writ of error. 18 R 413
2 Sam 101. q.

2 R 439
yet 113
1501 - 2624

Error cannot be tried on amendment ^{in case} of replacer or on refusal
of mandamus 38 R 911 4 Sam 2287 contra 473

The sufficiency of one joint letter against whom judgment is
rendered without signature of guardian cannot be
opposed as error in fact one writ of error in the same
court 15 March 66. - 18 R 49

Mist of Error

179

It is said that a Writ in error if non-mitted shall not have a second writ of error 2 R. 29. 19. 393. Aliter if by death of the Writ - of the Ch. Justice in Eng. - as this is the act of God - "Actus Dei" 1 Mel 658 South 203 2 Ba 209 Yelot 208 11 Mo 201

A writ of error is not amendable except to confirm the record by 11. 5 Geo. 1 because amendments are allowed to confirm not to correct Just 2 Ba 209. 82 5 Mo 16. 19. South 69. South 520.

In Eng. a writ of error does not abate by death of Writ - but curia-fu-ignus against his Ex. &c - Secus if Writ dies 2 Ba 209. 9. 1 Vent 94 South 286 402 South 201 Yelot 208. quid est 1 Ba 319 2 Ba 244 2 Saund 101. 0

In Ch & Eng. a writ of error is not a matter of right in all cases. In Ch the Judge is to examine the record & if he thinks there is no probable ground of error he will not sign it. In Eng. it is to be allowed by the clerk of errors before it is operative. 2 Lev. 277. 1 Roll 1192 2 Ba 210 4 Mo 681. South 264. 321

Error is not judiciable on the proceedings on petitions for new trial - But suppose new trial granted when it ought not to be - Ex. Dueson &c. 11 Mo 111 - 2 Mo 667 59. 1 Mo 49 5 Mo 187

Notwithstanding a writ of error - doct may be maintained on the judgt for the 24th is superseded the doct or only remains - since an erroneous judgt binds until reversed by writ of error - 7 R. 2 1558 3 Mo 215 - 1 Roll 712 2 Ba 211 2 Roll 490 Dy. 32 1 Side 236 1 Lev 153 Root 175. May 100

If the Court refuse to give any opinion relative to the issue & the Jury find a verdict in accordance with the required opinion there is no error. - Douglass v. M. M. White 2 Crav 298 and also Hinde v. Longmatt 11 Wheat 199. that if testimony is improperly rejected & affirmed during the trial admitted there is no error. 1 Mass 49 6 Cowen 455 490 7 do 364 16 Wm 89. 7 L. J. R. 218

Altho, the testimony rejected would have proved the
proper fact yet unless it appears from the bill of Excepⁿ
that the fact to be proved was pertinent there is no
error. Sumner v. Randall 1 Cranch 117. 6 Ct 149. 3 do 482

8 Co 112 11 Hen 388 Com 177. Root 176 But in some cases the Court will stay proceedings in the action of debt until a decision on the writ of error - But if a third person has undertaken to pay what may be recovered in a writ proceedings cannot issue they will not 2 H 131 372
2 S R 79. S 478-

When the writ is completely executed the writ of error is superseded - and if property has been taken & sold. 11 B 1 670
H. N. R. 237.

If goods are taken & not sold I. Beeve doubts whether the writ is a supersedeas or not - according to 2 Roll 140 2 Ba 370 the writ is a supersedeas. 4 Ba 684

In Et. it has been decided that it is not a supersedeas. In Eng. to be no supersedeas - Root 563 376. 4 Ba 634 1 Vent 258
Salk 143. 328 2 R 990 Cro 2597

On a judgment of affirmance the plaintiff is to allow interest on the original judgment in Et. & Eng. - so also on a writ 1 Bos. 29 But in Eng. interest is not allowed against bail in error - In Et. as well as in Eng. the court at their discretion may allow interest or not. 2 S R 78. 87 Doug 723 2 H 131. 284 - Et. Et.

According to our practice an erroneous judgment is as to the original bail and a final judgment - i.e. the original bail if not subjected by the first judgment are not on the second - occurs in Eng. Salk 2 Sw 175.6 Root 567 1 Ba 212 Cro 8911-

General rule that one

If the jury appt. higher damages than Pff demands
it is error by § 45 a 1846 285 n 6 5 Bin 564/
unless Pff remit the excess. He is ~~in~~ the action
of assumpsit Pff may have judgt without remitting the
excess 5 Bin 564 -

Where the sum demanded depends upon a debt or other
instrument there can be no remittitur as it is in works as
variance 1846 285 n 6 - Also can a remittitur be entered
at a term subject to that in which judgt is entered 285
110 2 Bl. R 1300 - see 10 Alp 252 - § 45 a n

If it appears from the record that the Pff. was an alien the
fact that war has commenced with his country after the
 rendition of the judgt will not prevent an affirmance
of the judgt. 9 Cranch 180

cannot assign for error that which might have been
pleaded in abatement - certain exceptions to this
rule - Rule 2 W.B. 227. 99. Caut. 121, 6 R. 766

If Jff. in error does not assign error the first judgment is not
affirmed but remains good - doft. in error does not remove
error on the writ but must resort to his bond - If Jff. in
error is reversed there is no judgment of affirmance or reversal
but merely for Doft. to remove his writ in error - 2 B. & C.
216 Lick. 294 2. R. 652.

If on reversal judgment in some cases remains
the proceeding under the original exp^{ts} - A. if goods or lands
are taken & kept by the officer or delivered to the creditor at a
valuation & judgment is afterwards reversed the property is restored
to the original Doft. - 2 B. & C. 231. 370 1 Pott 77. 8 2 Sel. 179 Bro. S.
246 3 B. & C. 177.

But if the property is sold by the sheriff to a
stranger on the exp^{ts} he will hold it notwithstanding the
reversal of judgment - i.e. when the sheriff is required by writ
to sell it - 9 C. & F. 104 1 M. & C. 573 3 L. & C. 89. 2 L. & C. 246
2 B. & C. 231 8 C. & F. 143 Bro. 2278 In Ct. the rule is different as
it respects bond because it is affirmed to the tender.

The rule laid down by Lord Coke is - that collateral
things executory are not reversed by a reversal - collateral
things executory are 8 C. & F. 143. 2 L. & C. 246.

So if one in exp^{ts} on
original judgment escapes & before judgment reversed against
the sheriff for the escape the original judgment is reversed

When the Record is made up a special assignment of errors to the list of Exceptions is not necessary. ^{and one suff.}
 If the Court may decide to have the judge recorded for matters appearing on the record or Bill of exceptions
 13 Idem 475. 17 de 218

If the facts stated in a special plea do not amount to a justification yet if issue be joined thereon & the facts are proved as stated it is error in the Judge to instruct the Jury that the facts thus proved do not in law acquit in the issue on the part of the defendant
 Otis v. Washburn 9 Branch 329

the action of escape is gone - But if judgment & ex^{co} had been obtained in the action for the escape before judgment reversed then the judgment would remain notwithstanding the writ of error - for here the collected thing is executed - but in this case the Sheriff might be relieved by Certiorari quarelesse
8 Co 142 1 Scum 38 Cro Jac 46 2 Ba 231

But suppose property taken & delivered at an appraisal into the hands of the party in whose favor the original judgment was & he sells it after which the judgment is reversed - & the property restored to the p^{ty} in error. 8 Co 143 Cro Jac 272 Yelst 179.

And if the Sheriff should sell the property to a stranger when he is not bound by law to sell it it is restored on reversal - As in case of goods of an outlaw taken by a captias where the Sheriff is not required to sell them but to keep them for the king - 2 Ba 143 - Cro Jac 278 1 Roll 778 5 Co 96 3 Ba 778

In Et^{er} a writ of error if not brot within three years from the day on which judgment was rendered - Root 54 - 1 will abate

In Eng^{land} it must be brot within twenty years from the signing or entering of the judgment on the record. St. 10 & 11 Ed. 3. 5 Com 290 Stee - 837.

When judgment is for Def^t in error he recovers his costs in the suit - if for the p^{ty} in error no costs are taxed on the suit in error - But if in this case the judgment in error puts a period to the

The land will not create a wind of war from the docked because it has no date & one of' withdrawing such suit will sever cuts but no damage. May 34-

An adm^r de lunition may have been in a judgt^t against
the previous executor as 8 lower 347. - Seen at C. S. of the judgt^t
had been in favor of the ex^r de

If the jury have been guilty of no negligence in procuring the attendance of witnesses & the court refuse a postponement postponement of the case it is over 2 March 384 6 (lower 577).

* But bail one liable for interest from the time of affirmation +
4 Burr 2127 2 KB 57

Writs of Error

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controversy as it will if the Deft. below is Pl. in error and prevail he recovers costs on the original writ - If the judgt. in error when for Pl. in does not put a period to the controversy (as it will not if Pl. below is Pl. in error & prevails) the cause is entered for trial or is remanded & if he finally prevails he will recover all cost except on the writ of error - Suppose judgt. is against Deft. below on an immortal issue as he brings a writ of error & prevails this does not put an end to the cause -

If Pl. in error has paid anything on the erroneous judgt. he recovers the sum as damages - If nothing has been paid no damages are recovered by him - But on reversal the Pl. in error recovers the cost he ought to have recovered below unless he has a further trial - if so then the whole cost covers the first judgt. - Under an stet interest on the original judgt. is allowed on judgt. of affirmance at the discretion of the court - So on non suit or retreat - It is allowed however I believe according to the practice - In Eng^t it is not allowed on debt on recognition against bail in error & in common cases the allowance of interest is discretionary in Eng^t - allowed on motion in R.B. 528 Nov 991 Bun 1096 108 R. 267 28 R. 77 - In Exchequer it is discretionary 276 B. 1 284 Bun 1097 2d ed. 101 10

Exemplifying cases

A vs. B. in the court below

Case 1. Judgt. below for A. to recover of B. \$20 debt & \$10 cost - Judgt. reversed before A. has recovered any part of his ex^{ts} Judgt. above is that judgt. below be reversed

When judgt is given for Def. & Def. brings error if the
judgt is reversed - it is a judgt of reversal only but if
the Def. brings error the court shall give such
judgt as the Court below ought to have given
1 Hall. Ab. 774. 2 Saund 256. 1 Bul 262. Inst 485 11 Mod

Commonwealth v. Howard 13. Mo. 321 Def. below lost, error &
judgt. reversed - it appearing from the record what judgt
ought to have been made the Court ordered it to be done
4 March. 99. & if it appear that the party reversing below
ought to have answered a further sum the case will be
remanded with directions to have judgt. no answer of Ct 22

If judgt. be for Def. on one count by a distinct judgt. for Def. on 1st. 262
another by Def. bring error on the first the point of error cannot 1 Hall. 774
examine the legality of the judgt. on the 2^d no error being Barth. 254
assign - as to that b 3d 200 Burr 215b

Writs of Error

151

That B. recover of A \$10. the amount of the cost incurred in the court below by B. But no costs are recovered by B. on the writ in error.

Case 1st. - The case the same except A has collected the contents of the ex^{ra} (to wit) \$20 debt & \$10 cost - Judgment of reversed as before & that B. recover \$40 - viz. the \$30 paid to A on the erroneous judgment & \$10 which B ought to have recovered in the court below.

Case 2nd. - Judgment below in favor of A (as above) affirmed in the court above - Here the judgment above is that the judgment below be affirmed & that A the Def^t. in error recover his costs on the writ in error - The judgment below is again operative - & if the court think proper interest on the judgment below is to be allowed & ex^{ra} issues for it - The practice is to believe to allow it of course -

Case 3rd. - The judgment below was in favor of B the Def^t. below - A by writ of error reverses the judgment - In this case the judgment is merely one of reversal - If the court above is competent to try questions of fact A on judgment of reversal enters the case in the court above for trial & on final judgment if he prevails recovers his debt damages & costs which accrued as well before the judgment as since - But he recovers no cost on the writ in error - If he had paid the

In debt for goods sold plea not dated except L.S. was to that a
tender the jury in the court below found that def^t did not
owe except as to the L.S. & as to that certain facts on which
they prayed the judg^t of the court which was given for def^t a
verdict on an issue held that on Affraining damages the
court of error might render judg^t for the L.S. 29. C.L. 349

There is no discretion to be exercised in reversing for
error or in granting new trials. 5 Mass. 518

A sued B. recoverd a collectd his judg^t. then B. lost error recoverd
of judg^t a had writ of restitution for the money paid under it -
then A. lost a new suit for the origin^l cause of action
& B. plead the payment of the first judg^t in bar. Held to be a
good defense in 1 Mass. 438 recoverd - 4 Mass. 96

costs taxed on him in the court below he would have recovered that in judgment in error as damages - but he must enter the action if at all in the court where judgment of reversal is rendered 1 Root. 85

Case 5 - The Court which reversed the judgment in the last case was not competent to try questions of fact - (as the Court of Ex. Ch. in Eng. or C. of Errors in Ct.) the cause is either remanded to the court below which must again proceed with it or if it is ripe for final judgment it will be rendered & exp^d. issued by the C. of Errors - Gleason vs Cowles. C. Errors 1803 1 Key 152. 1 Bond 30 2 R. 10. Cuth 319

Case 6 - Declaration in the court below to the declaration - Declaration adjudged suff^t. On writ of error the judgment is reversed - Here it would be absurd for A. the P^{ff}. below to enter since his declaration is adjudged insuff^t. & the Def^t. below never wishes to enter for trial -

Case 7. Declaration in the court below adjudged insuff^t. on error the judgment is reversed - Here A. enters for trial if the court above can try questions of fact - as he has a good declaration & the merits of the case have not been tried since the court above have only rendered a judgment of reversal & not one of fact - to reverse - & the court above cannot on judgment of

1811
The error will not lie for an indictment
of discretion in the Court below in a case where they
can by law examine a dispositive act. It is one if they
refuse to examine such discretion at all. Ex. Court decide
It has no discretion to examine when by law they have no
refuse to do any thing 3 March 366 Post 498

A & B, attach the land of C. by separate deeds, and then
so lease that they become tenants in common of the land
afterward A sues B for a share of the rent received by
while B paid them the judgt. A vs. C was reversed held
that B. might recover of A. in aumpuit the amount paid
on the judgt. agt him altho it still remained in full force
Larrell v. Miller. 15. Mf 208 10 March 354 Clowen 299-

reversed ascertain the damages-

- Case 8. Plea in bar - demurrer to it in Court below & adjudged sufft. - This was reversed - A enters for trial for as yet there is no judgt. for A. to recover & on the face of the record he has a right of recovery
- Case 9. Plea in bar adjudged sufft. insufft. below - judgt. reversed - If A. should enter it would be to no purpose - B. does not wish to enter. His object is to defend & there is no judgt. against him
- Case 10. Plea in abatement - judgt. below that the suit abate - this reversed above - Pff. enters for trial for he has a good writ
- Case 11. Plea in abatement as in last case - judgt. of respondeas ouster in the court below - reversed above - A cannot enter for he has no writ
- Case 12. If error is not for the admission or rejection of evidence Pff. below may enter or reversed for trial whether judgt. of reversed be for or against him or whether he is Pff. or Deft. in error - Ex. the witness of A. was excluded below on a bill of exceptions the judgt. is reversed - A. enters for trial - Here he is Pff. in error & the judgt. is in his favor - B's witness is excluded below - judgment

It is not competent to a court of Error to reverse amendments
in the record made by a court of record. for it can only
reverse matters of record & orders for amendments are
no part of the record 23 C.L. 246

If the facts offered & rejected are admissible yet if the
court can see that they were not suff^t to warrant
a jury^t in favor of the party offering them the jury^t
will not be reversed q. P. 1691.

received in his favor - yet he may enter for trial if he pleases for he may possibly prevail notwithstanding the admission of B's witness.

Note - In all the above cases in which the original Off. is supposed to enter for trial on a reversal of judgment - the Court above is supposed competent to try questions of fact - if this is not the case the record is remanded to the court below & then final judgment is had - see 345 Cases.

When the judgment in error facts amend to the litigation between the parties the action is never entered in the Court above or remanded for trial - the litigation is always ended when the judgment is affirmed - See on reversal of judgment ~~of judgment~~ unless the reversal of judgment is against the original Off. - & even in those cases when the judgment above is founded on the illegal admission or rejection of evidence the litigation is not of course ended the original Off. may enter for trial if he pleases -

If a Judge be reversed for want of jurisdiction - it is without costs & bench 46 ante 357u

1844

My dear friend, I have just received your letter of the 10th inst. and am glad to hear from you. I am well and hope these few lines will find you the same.

I have been thinking much lately of the future of our country and the state of our Union. It seems to me that we are passing through a great crisis, and that the result will determine whether we are to remain a united people or become a collection of warring states.

I am sure that you will agree with me in this view. I think that the only way to preserve our Union is by maintaining the principles of liberty and justice for all. We must not allow ourselves to be divided by sectional interests or by the passions of the moment. We must stand firm by the principles of the Declaration of Independence and the Constitution.

4 May . 44

I am, dear friend, very truly yours,
Wm Lloyd Garrison

The motion for new trial in Eng^d. if sustained by granting a rule to show cause suspends the judgment or prevents it from being entered up & the reasons are afterwards discussed in Banco - It may be granted at any time before judgment

Devg. 760

In Ct. it is granted on petition generally - Stat. 28 because formerly granted by the Genl. Assembly - It seems from a case in 1713, 163 that a new trial may be granted on motion - It may be in many cases in S. C. under a late rule of court where made before bill of exceptions filed - Till lately, there was no time limited in Ct. within which an application must be made for new trial - It is now limited to three years St. 178.

The petition states the grounds of the application & the opposite party may demur to or deny them -

The petition is no stay to the proceedings

Both in Ct.

& Eng^d an application for new trial is according to the genl. rule an appeal to the clemency of the court - hence it is seldom granted when justice has been done - Aliter when a point has been saved by the judge when the Court considers itself in the situation of a Judge at N. Paris - in hond Cases. 12 101, 206 Bull 326 3 East 457 1 Bos. 389 3 B. 391 1 Moll 2 Fath. 162. 246. 1 Bun 394. 99 2 R. 45 where B. Kenyon speaks of a presumption raised by the jury contrary to law - This rule does not apply in all cases -

New trial not granted for the purpose of letting a party
into a defence he might have made at the first trial
30127 case Oct 653 1 vol 98 181284 10 Nov 202 Vol 2 1191

Jof. Shall not be permitted to speculate on the result of Jf. 2 1199
use x if he gets but have a new trial to produce evidence, while
he might have had on the first 29 6 315

Many courts will impose terms on granting new trials. -
- Ex. Discovery of certain facts under oath - admission of
facts not intended to be litigated. 3 Bl. 392 Leath 648

In Eng^d
if the ground of application is any thing which passed at the
time of trial the information on which the court acts is
taken from the judges report - If it does not appear at the
trial it is disclosed by affidavit 3 Bl. 391 1 Sid 325 Le 140

Error
is not predicable on the decisions of courts in refusing or granting
new trials - it being discretionary with them Rily 21
2 Reg 361 qu - Suppose it granted in cases where it is
not under any circumstances grantable - as in felony?
In cts new trials are not granted by single ministers
of law - only by S & C. courts Rily 9. Stat. 28

As to the
antiquity of new trials see - 3 Bl. 131 Stran 101 3 Bl. 387 -
Burr 391 Leath 648 5 Ba 2110 Hiles 1462 1 Pl. 213 Sta 995
New trials in Eng^d are of late years granted after trials
at bar as well as at V. Bins - Burr 395 Sta 585. 1105
5 Ba 243 L.R. 1360

It was formerly holden that no new
trial should be granted in this case except for misbehaviour
of the jury - 11 Geo 37. 5 Ba 243 1 Sid 58 Leath 648

The gen^l maxim
is, that in all cases of sufficient importance a new trial must
be granted if it can be made to appear that injustice has been
done at the first trial 3 Bl. 388 Burr 395 Lucas 202 6 Bl. 628

204 205

Causes for granting new trials?

x Will a writ of Error lie for refusing a new trial in this case? -

New Trials

Nov 190

When the case is of small importance a new trial is seldom granted 3 BR 388. 92 1 Burr 295- 12 Co 665. 20 Qs. 11 BR 738 5 Ba 216

Genl rule in Eng. that motion for new trial cannot be made after motion in arrest. 12 Co 647 Exception - where the cause of new trial was unknown at the time of making the arrest. 5 Ba 211 Bull 325.

It has been holden that when there are several Defs. & part convicted & part acquitted or all convicted no new trial could be granted as to one or part for the verdict must stand or fall in toto Bull 326 2 Co 362 11 Co 275- 3 Keb 609 11 Co 814

Our Sup^r C. has collaterally given an opinion against this rule & it seems now established in Eng. 6 BR 638 24 Qs.

Causes for granting new trials

1. Want of notice to Def^t But if he has appeared & defended this is cured Bull 327. Consent of parties can remove all objections to the jurisdiction except those which relate to the subject matter - & In the case of want of notice the Court & Jurors are not left to their discretion so far as to refuse a new trial because justice has been done for there has been no trial & the Def^t has an unqualified right to be heard.

2. For defect or mistake of the Judge before whom the cause was tried. Ex. of defect when

Want of notice

3. Defects in Jurors.

the Judge is interested 5 Ba 244 11 Mod 119 for of mistake
in admitting or excluding evidence improperly 5 Ba
244. 6 Mod 5. 242. 7th 53. 64. 10. 202 - / So also for misdi-
rection of the Judge in point of Law - Bull 37
11 3 R 758 -

In some cases in Eng^l new trials have been granted for
misdirection of the Judge - admission of improper evidence by
the whole court - this however is not common 11 R 395. 11 R 585
1108 - The grounds of granting new trials in Eng^l are
great value - probable length & probable difficulty of the
trial (Oarg 420) No new trial for misdirection if
justice has been done 2 R 5 -

tho the admission of improper
evidence is good ground for new trial yet the incompetency
of a witness (not known) & not objected to at the trial is not
a substantive ground for new trial tho it may have its
weight among other things 13 R 77.

In 1776 our Sup^r h. granted
a new trial on this sole ground - the evidence was not objected to
at the trial - Powell vs Lambert so in Willets vs Overton 1784 489.

3^d For defect or incompetency in the Jury in some cases, &c. If the
jury might have been challenged as incompetent but the fact
was unknown at the trial by the party against whom he -
(5 Ba 245 7. Mod 57 1 Vent 30 11. 129) yet unless the cause
of challenge goes to the impartiality of the Jury - for in the
case in Vent 30 new trial refused on the ground of ~~both~~
batches - it does not appear that Def^t-liness of the cause of

Misconduct of Jurors

In general actions & actions for libel & defamation
a new trial will not be granted the Off unless some
rule of law has been violated in the admission or
rejection of testimony or in the charge or misconduct
with or by the Jury 2 Lesh, 180. 9 Cl. 37. 2 Lesh
483, 10 March 121

In Ct. It is an indispensable qualification that they
should be freeholders - if discovered after verdict
that one is not - must find it. - 16 L. R. 402 -

of challenge at the time of trial - In Rules 129 the party must have knowledge of the cause - In the motions in arrest of judgment are concurrent with new trials in the last case

4th. Misconduct of the jury - As corrupt practices - partiality &c
 & If the Jury refer the decision to chance. 5 Ba 250 2 Rev-
 140 Sta-642 2 Jones 83-

So for the misconduct of one juror as where he declared that J^y. should never have a verdict whatever evidence he procured (5 Ba 250 1st 615 -)
 - In very early times perfect unanimity among the Jury was not necessary but for a long time it has been necessary 5 Ba 283. 3 Bl 375-

In Eng. they are to be called if they do not agree (i.e. during the sessions) & the Judge will not receive the papers till they do agree - & verdict of eleven has been set aside in Eng. 5 Ba 283.

But an expedient has been adopted both in Eng. & Am. to evade the rigor of the rule - this is done by permitting the minority to come in silent - i.e. without directly assenting or dissenting & the assenters are not allowed afterwards to testify their dissent 5 Ba 251. 91. Corn 14 Nyl 116. 111 2 Sw. 263-

In Eng. the Jurors are locked up & it is misbehaviour in them to eat or drink till they have agreed on a verdict & returned it to the Judge 5 Ba 240 3 Bl 375 Moon 33. Vent 125-

Misconduct of Jurors.

It is a ground for new trials if the Jury before being sworn
expresses a determination to give a verdict one way

23 C 297

The verdict is good notwithstanding - the jury are liable to be fined Co. L 227. Dy. 218 12 Mod 111 1 S. con 132 BR 148

If the Jurors eat or drink at the expense of one of the parties before the verdict is agreed on & returned & they find a verdict in his favor it is bad & there must be a new trial. 12 Mod 111. 5 Bar 290 1 Vent. 125 Co L 227.

For the purpose of returning the Jury from confinement & abstinence till the verdict is delivered in Court - prize verdicts have been decided in Eng^d - i.e. - verdict delivered to the Judge out of Court (5 Bar 287. Co. L 228 Moor 33 (3 BR 377.) yet the prize verdict is not binding upon the Jury - they may vary from it in the verdict given in open court. 5 Bar 282 - Co L 227.

If the Jurors eat or drink after prize verdict at the expense of either party it does not vitiate the verdict unless they afterwards change it in favor of the party treating them - If they do thus change it it is vitiated 1 Vent 125 -

Prize verdicts cannot be given in case of felony, nor in any case of life or member nor where the personal appearance of Coft. is necessary to his conviction 5 Bar 283. Ray 193. 1 Vent 97. Co L 227. 2. Phil 687. 97.

Prize verdicts are not necessary in the

It is said in Vaughn 147. that the Jury have a right to found their verdict partly on their own personal knowledge - this seems not to be law 3 BR. 374 5 Bar 289 1 Phil. 133.

Verdict for Duff in mayor court - also in Supreme
 court - motion for new trial - court will take these
 facts into consideration - 3 Tolens 81.85

It seems to be a rule that a ~~person~~ juror has no right to communicate his own personal knowledge to his fellow jurors after they have retired. He should depose his knowledge in Court otherwise the verdict is bad as each party has a right to cross examine (1 Mch. 233) So to this rule seems inflexible from granting new trial because the verdict is contrary to evidence -

The Jury have no right to re-examine a witness after retiring if they do the verdict is bad & a new trial must be granted 3 Ba 288 Cro E 189. 1111.

In Eng. the Jury cannot take out with them any written evidence (the exhibited at the trial) without consent of the parties or leave of the Court (Secus in Am.) If they do take written evidence which has been given in evidence without consent of parties or leave of Court it is a high misdemeanor - tho if the writing furnished evidence on both sides the verdict is good Secus not. Co. L. 227. 5 Ba 288 2 Roll 714 2 Ro 1148 Cro E 1111. 12 Mod 250

The last rule is not so strong as the one above relating to percol evidence received by the jury for percol evidence may vary - If the Jury take with them any written evidence not exhibited at the trial the verdict is bad & a new trial granted 3 Ba 189 1 Sid. 235.

Tho the misconduct of the Jury vitiates the verdict yet they are not allowed to testify to the fact - the evidence must be derived aliunde. 13 R. 11. Barnes 438. 441 - Contra Sembl. 5 Ba 288 Cro. E 189.

Alcega *oleacea* var. *inc.* 2 Dec 264 Kintz. C. 142 273
277. Root 130 2^d 144 - overcalled *E. minor* I
oleacea *oleacea* 16000 480 —

Verdict and evidence found for Def^t if the fact was exonerative
no need trial will be granted. Burr II. 54. So if justice has
been done - Burr Vol 4. 254 146

4 Вис 2224

68R— 619

638

4Bun 2108

24e. 7c 288

5 Map HN 353

261. 263

2 Johns B. 128

137

120. — 284

2 Dall — 56

3 Beine — 29

Mentzelia 548

Метрени - 530

1. *Scaph. B.* 1484

In Ct when the Jury have misconducted - at extra motion in arrest we concur with new trials -

5. If the Jury find a general verdict & the Court it is not illegal conduct because they are not bound to find specially. This direction is generally founded on the application of one or both parties & if the verdict is against the opinion of the Court a new trial is granted (5 Ba 250 1 R. 1213) - new trial in such case refused (1. H. 183) but because it was after trial at bar in which cases formerly a new trial was not easily obtained -

6. Verdicts being contrary to evidence is a cause of new trial both in Eng & Ct. - 2 Rev. 272 Contra - It is not generally granted if the evidence hangs nearly equal - the evidence against the verdict must strongly preponderate - 5 Ba 290 2116.7) But it has been said that there must be no evidence in support of the verdict or so little as to amount to nothing at all. 1106. 1142-584. But this seems not now to be the rule - it is now said that the Court ought to grant a new trial if in the opinion of the Judge the verdict is clearly against evidence. 1 Bull. 327. 5 Ba 247. 1 Burr - 322 - * The matter must be handled delicately as the evidence is the province of the Jury

7. If the Jury have given a verdict on a misapprehension of or against law new trial will be granted 1106. 425 - 1146 Comb. 402 1 R. 1098 2 Wils. 307 - 4 R. 1170 1 R. 1171.

No new trial in Ct has been

New trial not granted because the Judge omitted to
change which might have been lost was not made at
the trial 39 Cal. 48, 49

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| 48 | 468 |
| 2 | — 4 |
| 2801. | 644 |
| 3 | — 646 |
| 1811. | 84 |
| 1801. | 338 |
| 2800 | 664 |

Where importance are not of themselves, but grounds for granting a
new trial unless there be some doubt in the question 23 R. 119 b28

Not a cause for new trial that the Judge decides
erroneously as to the right to begin 24 Cal 36

As the Court have power to grant new trial for excessive
damages in cases of bad conduct yet none have been granted
before or since the case in 4 R. 156 15 (Head 271)

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| 2111 | 4105 |
| 3 | — 62 |

granted for this cause neither is it granted in Eng^d when the cause is a bona one or justice has been done. 2 BR 5-

3^d 425- So if in point of Law Pff. was entitled to damages only & the verdict was against him no new trial is granted for justice is done 5 Ba 216 1 Burr 2093 4 BR 758

8th Smallness of damages is a good ground for a new trial - but this is good only it seems in action on contracts - No case in tort in which this ground has succeeded and the gen^l rule is against it 5 Ba 248. 1140 1051 Burr 332 - 2 Burr 366 2 BR 655 Bull 327. Said in 1 Burr 337 that smallness of damages is no ground for granting new trials in cases of torts -

The rule of not granting new trials for smallness of damages does not hold in cases where the Jury thro mistake have made the damages too small - i.e. in a point of Law - Nor where Pff. is deprived of just damages thro any trick or unfairness 1125 1259. Sel. 647.

9th Excessive damages is a cause of new trial both in cases of torts & contracts - The contrary holdsen heretofore in case of torts (Bull 327. Comb 17. 11426) 5 Ba. 249 new trial granted because the damages were excessive & the Jury appeared partial - Auth^r to the rule as it now is. 1 BR 277. Sel. 649 2 Wils. 244. 1105. 3^d 62 114691 5 BR 267 114657. 7th 529. 1 Burr 609. 1046 Comb. 537 From the current of authorities presumption of partiality seems not necessary the sense of the modern books looks

The Court will not grant a new trial because the witness
 on whose testimony the verdict was had have been indicted
 for perjury in the case 156, L. 72 1813 329 Mitchell v
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 Beaumont

that way Cowp 231. 5 Com 155-

New trials granted in Cr where
Pff. in book debt took judgment by default - 15011 Moody 34

Suffering a default
is only an admission that something is due unless the
action is not on a written security. 121. 155- 3 BR 302. Ch. B 195
Br. N. 278-

New trials never have been granted for excessive damages
in cases of crim. con. (1 BR 65. 25). 1st Rayson seems to doubt
whether a new trial may not be granted in this case -

5 Br 250- New trials granted on this ground in the
case of Lepaul & Bellay 1 BR 257- No case of new trial for
detaching Pff's daughter 2 BR 5. 167. 3 Wils 18-

It may be granted
in case of slander - Semb (5 Br 250 2 Jones 200 Stiles 462
101. 611. 121. 394.) No case semb. in which it has been
granted in case of slander for excessive damages only - in
H. 1162 the misnomer of the day was an incident (2 Wils 249
1 Ber 97.) said by D. Thompson 1 BR 277. that it may be granted
in any case - qu- whether grantable unless some standard
by which to measure damages - 1 BR 524.

The strong
language of B. Camden (2 Wils 205. 44) is contradicted by a
great number of authorities - cited (5 Com 155) 5 BR 257. H.
657. 101. 619 I have found in the books 120 applications
for new trials for excessive damages & only 3 granted -

It is by mistake by the day in computation &c. the Pff. obtains a

A new trial for mispleading is granted only
where the terms of pleading ^{is} adapted to the
facts constituting the defense - no ground
for a new trial that the party has mispleaded
his defense. 1 Et R. 380 in 2 Will. 113 120
6 B. & C. 671 94. in Et -

When any thing is left to any person to be done according
to his discretion the law intends it must be done with sound
discretion & according to law & the higher court has power
to reverse things that are otherwise done notwithstanding
they are left to the discretion of those that do them
(Lill. Mort. 477 Luc. L. D. 10 Mand. 291)

Where a discretion is to be exercised according to certain
fixed legal principles, especially by a court of Justice of which
body has mistaken the law or violated such fixed legal
principles, it may be a proper case of review & correction
by a higher tribunal but if the exercise of the power is entrusted
to the sole judgment & discretion of a particular person or body
& is exercised in good faith no court can interfere with
the proceedings 4 Paige 251 3 B. & Ald 371 ante 486

a verdict for more than is due no new trial granted on this amount if the J^y. will release the execs 2 RR 13.23. 1 H. 188 Coups 571 2 Wils. 262 1 East 637. So if the mistake is occasioned by J^y's miscount -

10th Mistake of counsel in pleading a wrong plea in Ct. - Mispleading 3 Burr 1285 1 East 627 2 RR 131 5 Bar 251 10 Mod 203 H. Ct. 28

Neglect of Council not a good cause - he may have his remedy against the Council - 5 Bar 251 1 H. 221 Sed. 645 -

It is never granted to enable Deft. to plead usury - Infamy - St. Limitation or Coverture - I conclude not of Barr otherwise of Bankruptcy 1 Bos. 52 - 1503

In Ct. the petition must state the plea he wishes to make that the Court may see whether it is suff^t. Also that he is able to prove it - So he must shew that the new one could not have been given in evidence under the gen^l. issue in the former one. 1 Root 573 - 3 East 167. 222 -

11th If a material witness is absent there inevitable necessity as by age 8c. 5 Bar 252 - 11 Mod 1. C. 22 - 1 But in Eng. new trials are not granted for this cause unless the witness makes affidavit of what he knows about the Court may see whether it is material or not 5 Bar. 252 - Sed. 645 -) qu - Will it be granted for Deft. for this cause if the defence to be proved is unconviction? - for trial will not be postponed in such case. 1 Bos. 454 -

12* Discovery of new evidence

When the atty. of one party gave notice to the atty. of the other to produce on the trial a material paper in his posⁿ & the latter atty. before the trial died - the paper to a third person & the first atty. was not notified of this until the trial had commenced a new trial was granted on the ground of surprise 7 Mend 62

A witness used at the trial may be introduced as new as to what has come to his knowledge since that N.D.

In the petition in this case must state the testimony before new trial is granted the witness must testify (on the trial of the merits of the petition) what he knows

So if the attendance of the witness is prevented by coin of the opposite party - or by arrest &c. - new trial will be granted - 5 Ba 251. 11 Mod 141

But if a material witness is absent wilfully or thro his own negligence no new trial will be granted - Rule to shew cause not granted in Eng. 1 Pet. 633 5 Ba 251 Run 322 New trial never granted for the absence of a witness whose testimony he might have had 5 Ba 252 - 5 Com. 152 - Pet. 647 Sta. 691 ~~tho~~ 11 Wils 98 2 Atto. 22. 10 Ch 194 -

It seems by 2 Atto. 319. Sta. 691 that surprise by the introduction of unexpected evidence is no ground for new trial - Policy 131. R 298 - 1 Contra by Supr C. 1799. Austin vs Gaylord - there was in this case a mistake in the evidence of one witness - But in Eng. a mistake made by a material witness is not a ground for new trial - "of dangerous consequence" to grant new trial for this - 5 Ba 152 - 1 At 28

12th Discovery

of new evidence which is material is said to be good cause for new trial in Eng. 2 Mod. 584 5 Ba 252 Holden contra 5 Ba 252. 10 Ch 194 7 R 269

This is only one H. 28. a ground for new trial & the most usual ground - But the Court must be satisfied that the evidence is material & newly discovered - If of due

2. So too in case of a minimal prosecution / Nov 1857 / new trial granted -

New trial not granted for the discovery of cumulative testimony 15 Johns 212 - It cannot be objected to the granting of a new trial that the new discovered evidence is cumulative if it be of a diff^t kind & character from that adduced on the first trial either, both go to establish the same fact. Ex: on the first trial acc^t attempted to prove payment by circumstantial evidence new trial will be granted if he can prove it by direct & positive testimony 4 Mass 579 - If the new evidence goes to support a fact attempted to be proved on the former trial it is cumulative & no new trial will be granted but if the new discovered evidence does not endeavor to establish a fact attempted to be proved on the former trial. It is not cumulative - Ex: It is important on the first trial to prove that a certain event happened on a particular time at a particular place & witness A swears he was present & witnessed the transaction the other party calls witnesses who swear they were present at the time & place & no such thing happened neither party can have a new trial because they have given direct & sworn testimony who will swear in consideration of the others but if A & B now discovered witness A swears that one of the former witnesses was not present but at a diff^t place at the time & such testimony is not so cumulative 10 Mass 296 -

alleging the party might have known of the evidence
no new trial will be granted 7 M 269. 1 R. 198. 5 Ba
252. 13 M 84, 2 R. 113 Dec 273. Kirby - 282 -

The petition

must state the new evidence & the substance of the
old - The witnesses to the new facts must be named
the all need not be Kirby 283 2 Dec. 27. 1 Root 89. 2

If the

testimony stated is not material the petition abates
- Not granted for any omission or forgetfulness of
a witness - policy - 5 Ba 252. Dec. 28 -

13th. Improper

admission or rejection of a witness or evidence, it is
said that if a cause has been lost by the testimony
of a witness legally infamous new trial granted
in C. C. - Reason of resorting to E. G. 11 M 3945
P. C. 194 (Feb. 153 12 M 84 contra) But the best
cases noted on the ground of neglect - the infancy
of the witness was known at the trial but the
error not excluded -

If the fact was unknown at the time
of trial a new trial would perhaps be granted - for it
has been considered in Eng. that the incompetency of a
witness arising from interest discovered after the trial
is not of itself a sufficient ground for granting a new trial
1 M 77. Peckh. C. 187

In Ct. new trial is granted in the case
where the fact was not known at the trial - so where

Where the defense on the first trial was set out in the
pleadings, upon a new trial being granted the parties
will necessarily be confined to the issues on record at
the first trial so where a particular line of defense
was relied on on the first trial under the gov. if the
court on granting a new trial will confine the
parties to the issues as per 20 C. 193.

S. 497

the injury is not legal but moral -

§ 4^m. Misconduct of the parties, as treating the jury - keeping away the witnesses of the opposite party. 11 Mod. 141. So if a party solicits a juror to give for him or make any representation in his own favor & the verdict is for him - new trial will be granted 5 Ba 292. 2 Roll 16. 11 Mod 452

Same practice by Ctys have the same effect - as where the Ctys before trial wrote to two of the jurors stealing the handwriting of his deants case 2 Ba 252. 2 Vent. 173. So any kind of embarrassment practiced by the parties or their counsel is good cause for new trials 11 Mod 119 436 110 - 111. 110 - 111. 110 - 111.

In Ct.

Def^t in book debt knowing that a certain sum was due to the P^{ff}. & expecting that he would take judgment for that sum - only suffered a default - P^{ff} took judgment for a greater sum - sometimes paying cost

Formerly holden in Eng^d that new trials were not grantable in debtment became not conclusive as a new action may be, 11 Ba 253 1 Donc. 225 101 648 Said in 1106 except under certain circumstances - this rule never applies in Ct^s - here the action is final.

The rule now is in Eng^d that new trials are as readily granted in this as in any other actions if verdict is for P^{ff}. - Less when for Def^t except for special reasons because when for P^{ff} it changes

The Court have no power to grant a new trial
where a ~~def~~ has been acquitted contrary to evidence
but where the acquitted has resulted from the error
of the Judge see on 4 Bond 266

But in quantum ~~pro~~ as to the civil part only without
the other 1 Bond 87. 6

the hope of a new trial but not when for the Def^t. 5 Ba 253.4
Burr. 323. 2204

Formerly helden that after two similar verdicts a new trial ought not to be granted (1 Lec. 9)
1 Sid. 131 1 Sed. 649 5 Moa. 22. 5 Com 155- 5 Ba 243) Now
not so often awarded as in other cases Burr. 2108

^{New} is not regularly grantable upon a ground not taken
at the trial 10 Mod 202 - In gen^l new trials are not
grantable against Def^t in criminal cases, tho in
many cases they are in his favor 1 Root 80 1 Camp 37.

In
criminal prosecutions in Eng^l - higher than for mis-
demeanors no new trial is granted for either party
6 SR 138 - When the offense is not higher than a
misdemeanor the Court may grant a new trial in
favor of Def^t - as in case of a libel perjury &c - 1 Camp 760
1 Root 159 6 SR 638 1102 5 Ba 255
5 Burr 2609

In Ct^l new trials are grantable in favor
of the delinquent even in cases of felony but not in favor
of the public - 1 Root 80.

But where the offense does not
surmount a ~~felony~~ misdemeanor &c - (even where an
action is brought to recover a penalty on a penal bond sta-
-tu^t. 2 Cent 451 5 M 20 1 R 743) the gen^l rule is that
no new trial can be granted against the delinquent -
5 Ba 254 1102 899 101 1238 1 Burr 310 1 Sid 154 1 Lec 124
5 R 63. 2 M 487 1 Root 80.

For offences greater than misdemeanors a new trial cannot be granted on the merits in case of either acquittal or conviction & Mand 549 6 RR 638. But in case of misdemeanors a new trial may be had on conviction but not on acquittal. 8 Mand 549 Ch. C. S 532 13 East 466 n 6 3 RR 344 n

Where the Judge instructed the jury that if they believed one witness when several had testified respecting the matter ~~a verdict~~ is they ought to find for the def^t - if they do find a new trial will be granted - the charge should have been "that if on the whole evidence the believed a particular fact" - 11 C. & P. 142

See exceptions to the last rule - 1. When the Court has
 permitted a party to obtain an acquittal. See 1258
 5 Ba. 254 - 1 Moat 93 See 646 12 Moat 9 1 Shaw 326
 1 Ser 124 - L.R. 63 - 2. When the acquittal is ordered
 by the misdirection of the Judge in point of law -
 (5 B.R. 20. 4th) 53 -

And on a quintan prosecution a
 new trial cannot be granted as to the civil part
 unless grantable & granted as to the criminal part
 also. 1 Moat 867.

New trials never granted to enable a
 party to plead St. Limitation - So in Ct. new trial
 refused where the object was to plead unav, L 498

Granting
 new trials in Engl. Ct. vacates the judgment - But terms
 are imposed when necessary - here if pending the
 petition for new trial the respondent dies his Ex^{rs}
 may be cited in li. in fa. & the petition may proceed
 provided the right of action survives to or against the
 Ex^{rs} - according to the nature of the case - i.e. to him
 if his testator was off. in the action against him if
 his testator was Ct. - S.L. Kenton Feb. 1860 Report of
 cases in Court 23. 473. S. Kene -

Note. As to the last
 case that the St. relating to "abatement" & "amendment"
 of writs was made before our Courts had power to
 grant new trials see Par C 273

If the right of action

But against several one supposed default & damages
 assessed against him the others were acquitted. A new
 trial granted against a part of default & held also
 that the one who supposed default should not be
 prejudiced by the default trial but might liable
 to lose damages if he should be pronounced 256. L. 156

Nothing is a ground for a new trial that would not be
 a ground for a bill of review in Ey. 9 Bt 788 1 Ch. C. 43
 2 H. Ch. 125. and a Bill of review cannot be sustained on
 the confession of the party after the original decree made
 16. C. 43. 44. in 9 Bt 788 & for much law on the subject of
 Bills of review - the new matter must show the right of
 the party at the time of the decree which was not then known
 to him 2 H. 576 - not additional confirmatory facts or proof on the
 same points which were in issue 17 H. 211 179. 200 B. 1100

does not survive in the last case the petition must
abate because no new trial can then be had

Subject to
the foregoing qualifications the petitioner might doubtless
proceed in case the petitioner should die pending the
petition -

As to costs on new trials, see 8 S.R. 619. 3^d 507
1 H. 131 639. 41.

In Eng^d when the costs are directed to abide
the event if the party who was successful on the first
trial succeeds again he shall have costs in both
trials - But if the party unsuccessful in the first
succeeds in the second he shall have costs only on
the second - Yet in this case the other loses no costs
on the first - 8 S.R. 619 3^d 507. 1 H. 131 639. 41

200
11 Aug 30
x It is in the nature of an inevitable suit in which the exact value rights
of the parties will be recorded. 2 Johns & 227. 258.

1130, 428 Since by Law that it is the modern practice to
interpose in a summary way (ex. by motion) in all cases where
the party is entitled to relief by another

In L. i. if the party would take advantage of some matter of fact - Ex. Release
or pick out in discharge of the judgment. The proper course is by Term L. 2 Johns &
258 274 531.

Audita Quereela

505

* This writ is used to obtain relief when ex^r has sued on a judgment & is pressing the Def^t. when for some reason he ought not to pay it
1 Roll Rep. 13a 193 2 Swift. 273.

This is the case when the judgment itself ought not to have been obtained or when Def^t. can show something that will discharge his liability on that judgment - as Release &c. In such case the officer having the ex^r is not warranted in judging of the validity of the release &c. in discharge of the ex^r. so that audita quereela is the only remedy.

Audita quereela is applicable tho the original action was not Root &c.

If a debtor imprisoned on ex^r. is liberated with consent of the creditor he is discharged & if pressed afterwards with ex^r. he is entitled to audita quereela - If Def^t. has no day in Court - or judgment has been rendered on confession or otherwise against a minor without his guardian an audita quereela will be granted.

* In Ct. if pending an action on a note (Def^t. pays the debt & takes a discharge & the Pl^f. afterwards takes judgment by default & ex^r. Def^t. may have audita quereela the Court considering him as not having had a day in court since he was justified in trusting to the Pl^f. under such circumstances - The Pl^f. in audita quereela may also recover what he has paid on the ex^r.

This writ lies also when the judgment has been obtained by fraud & ex^r issued -)

A bondman may be relieved by ex-gu against the debt in a judgt.
secured against him for the escape of a prisoner whose the original
creditor's right of action is limited against the Sheriff by the St. Statute
11 Geo 151 / That he can be relieved as to the debt in ex^g only
and 1 Geo 178 Geo 3 537. 11 Geo 151

By St 24. service on joint obligors who are within the
state is good as to each if any are aggrieved they may continue
by Exec. du Pr. 2. 36

If a bondman is subjected after his principal's liability is barred by St. Statute
he may be relieved by Exec. du 2. 90. 91

If a person a judgt. against an adult & infant the infant not
having been served with process / St 44 p 14 / their joint
property is taken in ex^g the inf^t remedy is by conclite 15
Bond by Conclite 278

9th June 221

An audita quercia when determined for P^{ff} not only creates the exp^s but also gives damages for the injury sustained by reason of the exp^s he-
2 du. 274. This writ contains a reference to the exp^s he till a final judgt. upon it - On taking out this writ a bond must be given to answer all damages sustained by the other party in consequence of it.

This writ discharges the Debt^r from prison & the bond serves as an indemnity for his person & in this case it is a final super-recedas & the only remedy for the P^{ff} is on the bond - In or this writ is granted only by the Ch. Justice of C^o Pleas - This writ is not granted of course but at the discretion of the Judge who examines the facts stated in the petition & decides on the justice of the petitioner's claim to relief - If one is by default or a groundless assent by the other party prevented from attending Court & judgt. goes against him he is entitled to an audita quercia on the ground of his never having had a day in Court.

If two judgt^s are obtained & two exp^s taken out against two joint & several obligors only one exp^s can be collected - If therefore one of them have been satisfied this fact may be pleaded in bar of the debt (qu) tho' not of the cost recoverable on the other judgt & if after the payment of one exp^s the other is imposed on Debt^r for more than the cost remedy may be had by aud. quercia - If an audita quercia recover judgt. takes out exp^s against the debtor & an exp^s appears afterwards & proves the will of the debtor the debtor may have an aud. quercia against the claim^r if he prepay him with the exp^s Lawdoff 19.20.30

If an absconding debtor had before absconding obtained judgt. & exp^s against his debtor & put the exp^s into the hands of an officer - Such debtor tho' factored in a suit against the absconding

A party who obtains his discharge under the insolvent act after
judg^t may be relieved by C. R. 4 Solm R 191

It is usual to grant the same relief on motions as might be
obtained by C. R. 4 Solm R 191

The writ must be allowed in Spain & it is not of itself a supersedeas,
which may be granted or not according to the circumstances of the
case, 2 Solm R 227

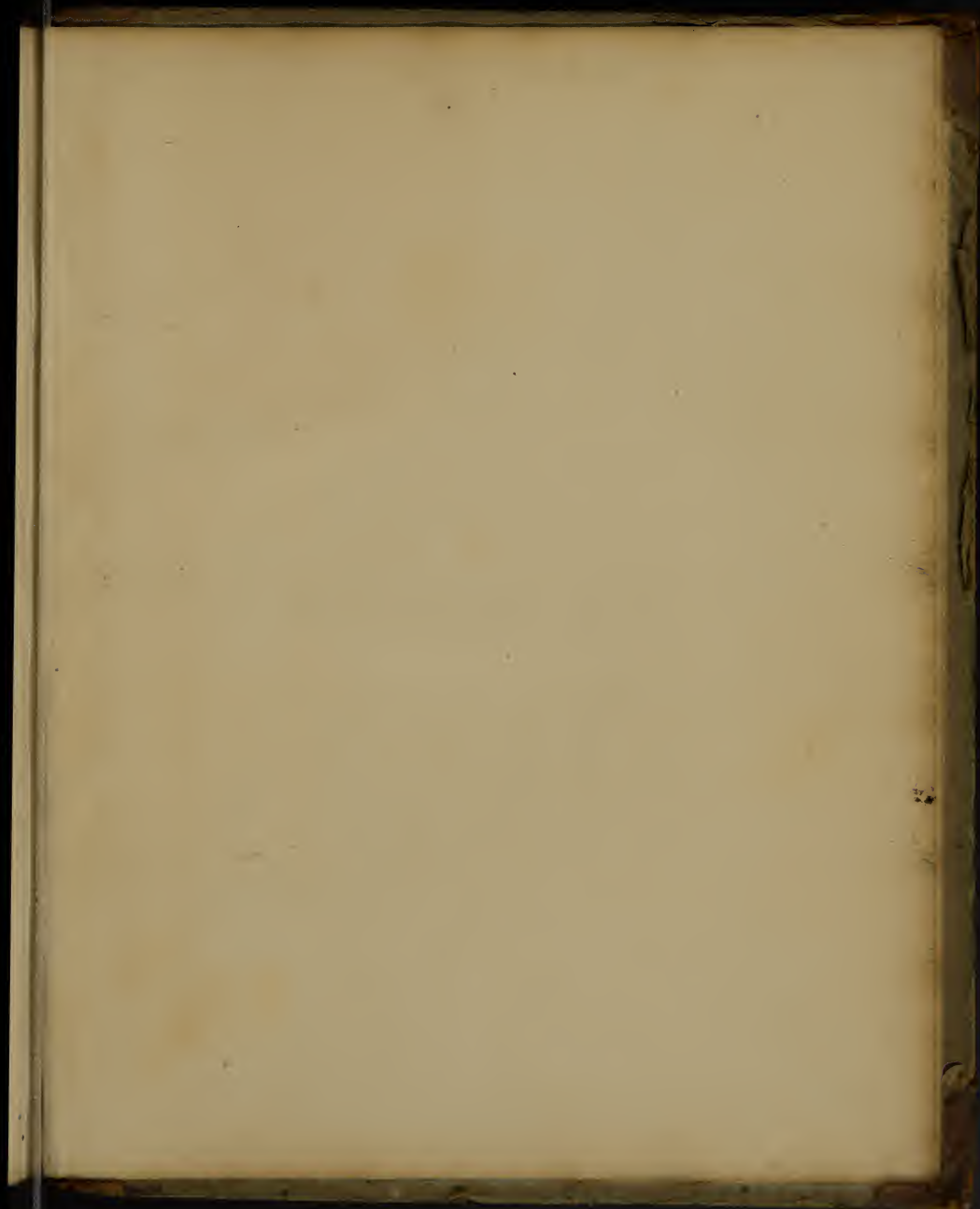
A. sues B. upon a note. B. then pays the debt & A. obtains
judgment & returns the writ & takes judg^t & exp^e. B. was
relieved on audita 10. Nov 101. Corjooy & Mables

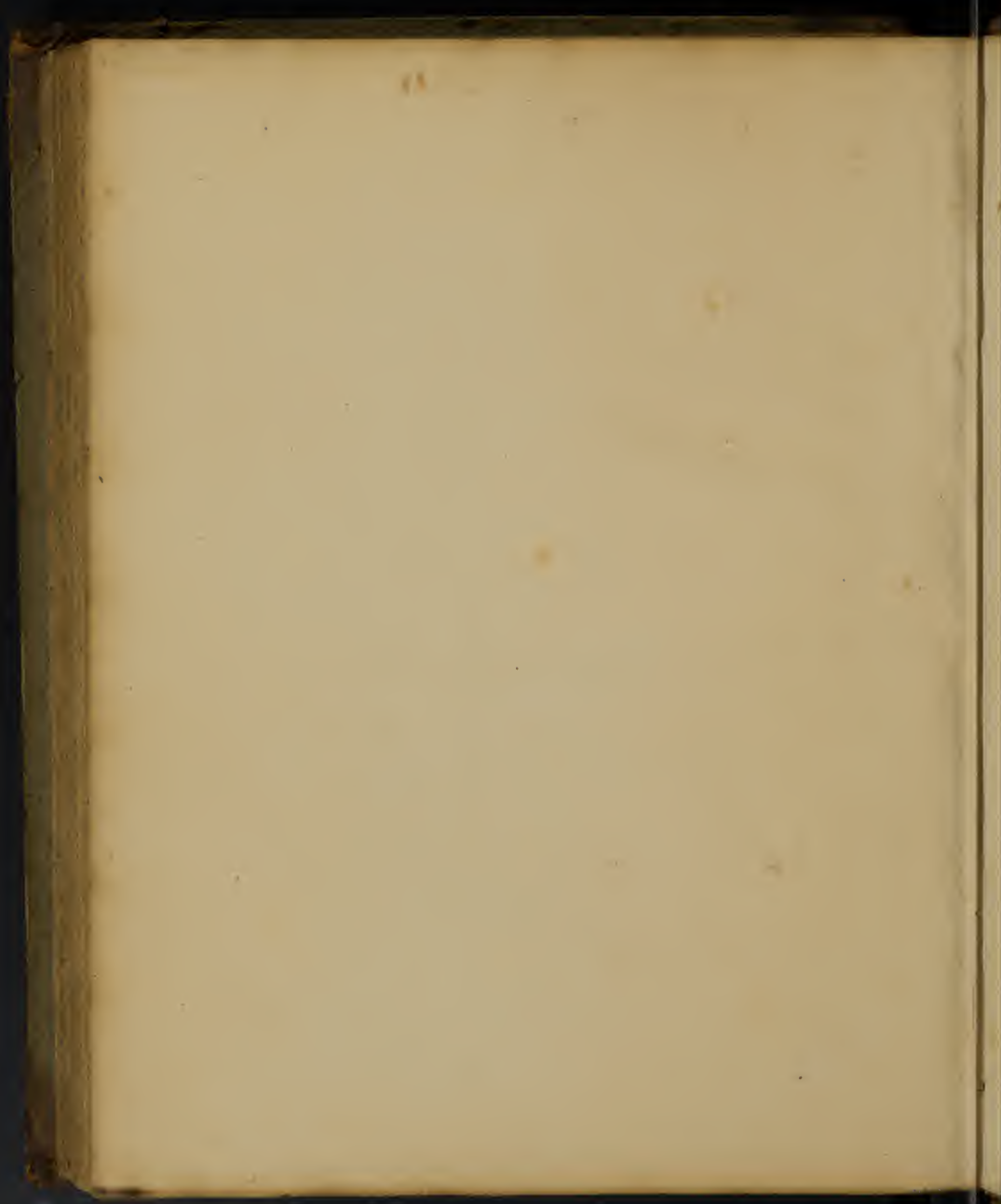
debtor is obliged to pay the amount of the ~~exp~~ to the officer & in so doing he is indemnified against the former writ instead of being driven to sue Ans. 2u - against the officer - (Government the money in this case remain in the hands of the officer?)
 . If in foreign attachment does not by calling on government to disclose whether he has property of the principal in his hands precludes himself from adducing other evidence of the fact

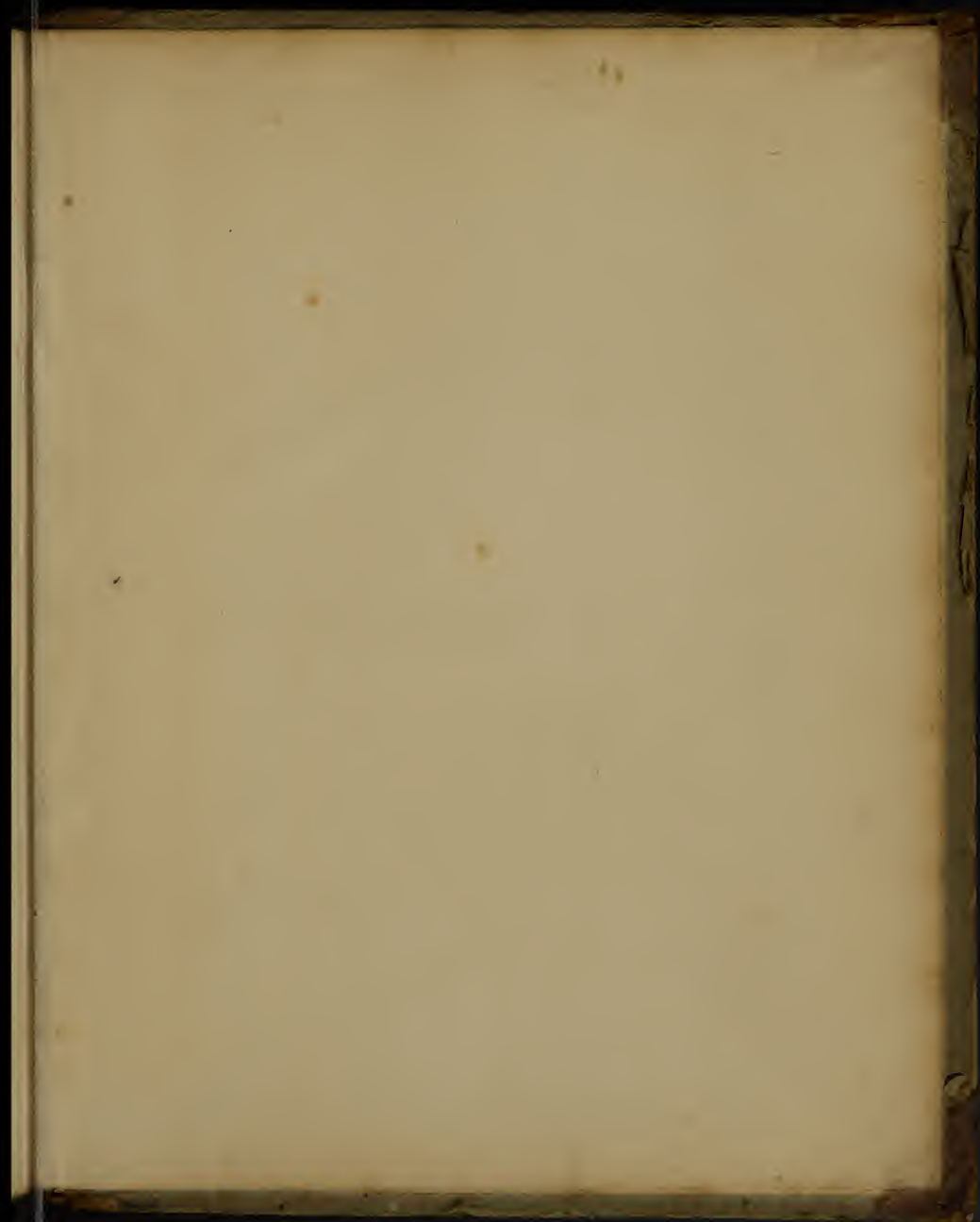
Rest 545-138. 2d.

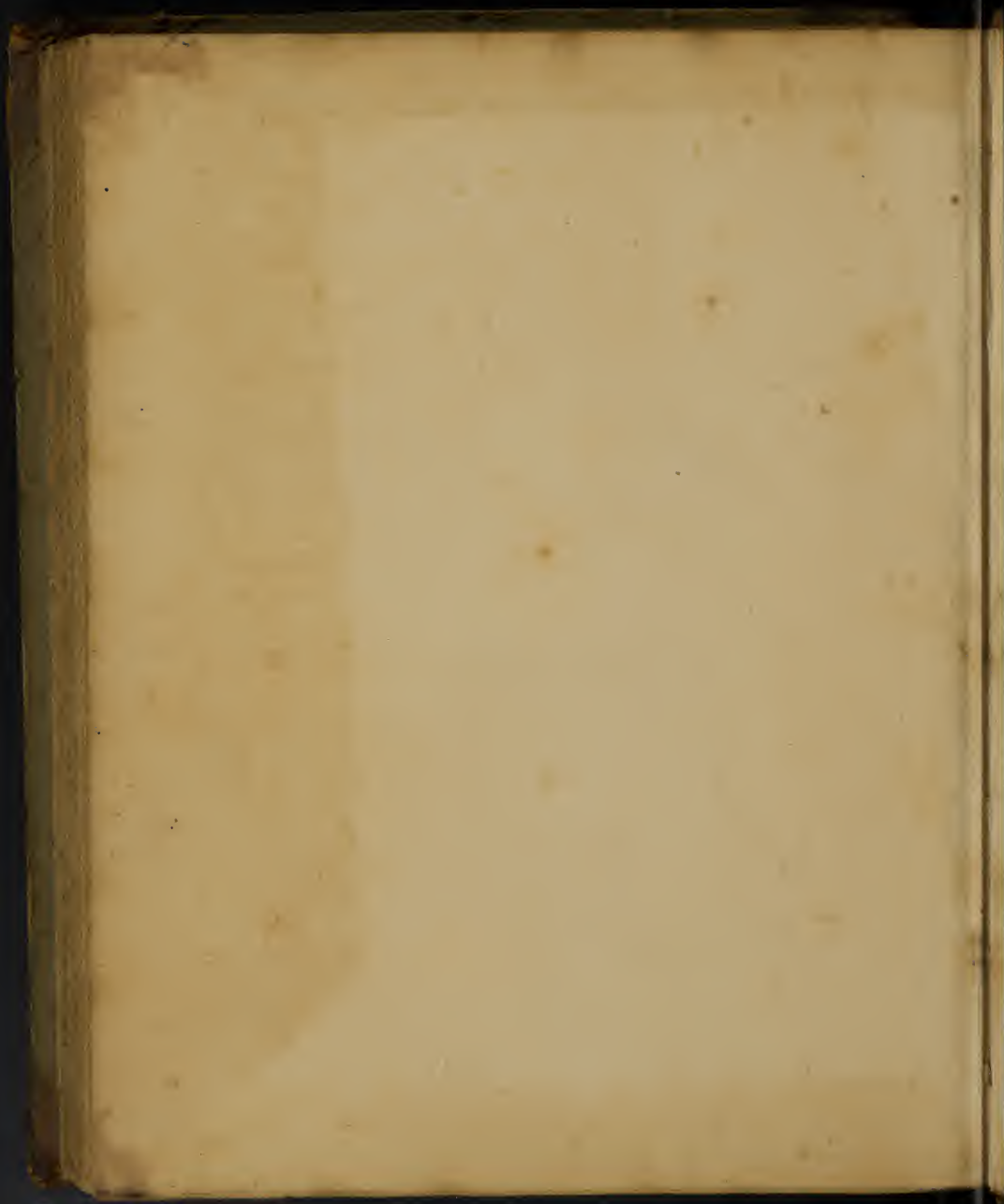
¶ A bond given by two obligors is paid by one who has left the State & the remaining obligor is sued & has judgment against him & ~~exp~~ taken out against him Ans. 2u - lies, if the debt brot on the judgment if brot within this State - if brot out of the State a new trial may be granted - When one of two joint obligors has left the State service on the one remaining is good as to both -

In Eng. upon affidavit by the party applying for relief against an ~~exp~~ on rule of Court granted for the other party to appear & deny on oath the facts stated by the applicant - If the party appears & denies the facts on oath Ans. 2u may be heard to try the facts - If he does not then deny them the ~~exp~~ will be set aside -









Gift of
Donald J Warner
11-18-41

